In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN G. CARLISLE,
R. S. LOVETT,
J. P. BLAIR,
MAXWELL EVARTS,
Of Counsel for Plaintiffs in Error.

G. A. Hamerton, Printer and Custom House, N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 81.

THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY ET AL.,
Plaintiffs in Error,

vs.

THE STATE OF TEXAS,
Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

The State of Texas, by an Act of the Legislature approved November 25, 1850 (printed in Appendix to Brief, p. 1), accepted the proposition

made to it on the part of the Government of the United States and contained in the Act of Congress approved September 9, 1850 (9 Stat. at Large, 446), and agreed to take "ten millions of dollars in a stock bearing five per cent. interest and redeemable at the end of fourteen years, the interest payable half-yearly at the Treasury of the United States" in compromise and settlement of the controversy respecting the Northwestern or New Mexico boundary line.

Thereafter and by an Act of the Texas Legislature, approved January 31, 1854, and entitled "An Act to Establish a System of Schools" (General Laws of 1854, p. 17. See Appendix to Brief, p. 4 *et seq.*), $2,000,000 of the stock above mentioned were set aside and designated as a "Special School Fund," as distinguished from the "Perpetual School Fund" provided for by Section 2, Article X., of the Constitution of 1845.

On August 13, 1856, the Legislature passed an act entitled "An Act to Provide for the Investment of the Special School Fund in the Bonds of Railroad Companies Incorporated by the State" (Gen. Laws 1856, p. 31), by which the Governor, Comptroller and Attorney-General of the State of Texas were constituted a Board

of School Commissioners, whose duty it was, under regulations and restrictions prescribed by the act, to invest the "Special School Fund" created by the Act of January 31, 1854. This Act of August 13, 1856, is printed in full in the appendix to this brief at pages 11 to 17.

In accordance with the provisions of the Act of August 13, 1856, and prior to the year 1860, the State from time to time loaned to the Houston and Texas Central Railway Company and to the Washington County Railroad Company portions of the "Special School Fund" amounting in the aggregate to the sum of $450,000 (Record, p. 7) and the sum of $66,000 respectively (Record, p. 7).

In 1870 the railroad and other property of the Washington County Railroad Company were purchased by and became a part of the system of the Houston and Texas Central Railway Company, the two companies being in effect consolidated (Rec., p. 96).

All the property of the Houston and Texas Central Railway Company and the Washington County Railroad Company as thus consolidated was sold in 1888 under foreclosure proceedings and the purchasers under the foreclosure sale

organized under the general laws of Texas the Houston and Texas Central Railroad Company, the plaintiff in error, which company now owns all the lines of railroad and property included in and covered by the lien in favor of the State to secure the School Fund loans originally made by it to the Houston and Texas Central Railway Company and to the Washington County Railroad Company (Record, p. 20).

The railroad companies, under which the plaintiff in error claims, paid the interest and sinking fund maturing upon the loans made to them from the "Special School Fund" by the State of Texas as aforesaid, as required by the act under which the loans were made, until prevented by the Civil War commencing April 12, 1861 (Record, p. 8).

On the 9th day of February, 1861, the Legislature of Texas passed an act authorizing the Board of School Commissioners to receive treasury warrants in payment of the two per cent. for sinking fund payable by railroad companies in whose bonds the "Special School Fund" had been invested (General Laws Extra Session 8th Legislature, p. 19; see Appendix to Brief, p. 18).

It is important to observe that the act just

referred to was passed before the commencement of the Civil War.

Afterwards, and on the 11th day of January, 1862, the Legislature of Texas passed an act entitled "An Act for the Relief of Certain Railroad Companies in the State of Texas," which provided "that the payment of all interest due and to become due on the bonds issued by the several railroad companies in the State of Texas for loans from the Special School Fund be * * * extended until the 1st day of January, 1864" (General Laws of Texas, 9th Leg., p. 37; see Appendix to Brief, p. 19).

Before the expiration of the time limited by the Act of January 11, 1862, for the payment of interest and sinking fund upon the loans from the Special School Fund, an act was passed by the Legislature of Texas on the 16th December, 1863, as follows:

> "SECTION 1. Be it enacted by the legislature of the State of Texas: That the comptroller of the State be, and he is hereby, authorized to receive from the railroad companies in this State who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due, provided the same is tendered in State

bonds or in State treasury warrants, previous to the meeting of the next regular session of the State legislature.

"SECTION 2. That, for all sums so paid in, the comptroller and treasurer shall issue to the special school fund the bonds of the State, bearing 6 per cent. interest.

"SECTION 3. This act to take effect from its passage" (Gen. Laws of Texas, 10th Legislature, p. 37).

Afterwards, and on the 28th day of May, 1864, the Act approved December 16, 1863, was amended to read as follows:

"SECTION 1. Be it enacted by the legislature of the State of Texas: That the provisions of the act of which it is amendatory shall not apply to railroad companies that fail or refuse to receive State bonds or State treasury warrants at par for freight or passage at the prices or rates established by law.

"SECTION 2. That whenever satisfactory evidence is produced or furnished to the comptroller of the State that any railroad has failed or refused to receive the State bonds or State treasury warrants at par for freights or passage at the rates established by law, he is required to refuse the State bonds or treasury warrants for the interest due by said railroad upon its bond.

"SECTION 3. That the president of any railroad in this State be, and is hereby, re-

quired to post in a conspicuous place in the railroad offices and in the passenger cars the provisions and terms of this act under a penalty of $100 to be recovered for the benefit of the State by suit before any court of competent jurisdiction upon information of any party.

"SECTION 4. That all laws or parts of laws conflicting with this act be, and the same are hereby, repealed, and that this act take effect from and after its passage." (Gen. Laws of Texas, 10th Leg., Called Session, p. 9.)

In the autumn of the same year—to wit, on the 15th of November, 1864—the Texas Legislature passed another act authorizing the railroad companies to discharge their indebtedness to the "Special School Fund" in treasury warrants. We give the act as follows:

"Be it enacted by the legislature of the State of Texas: That the railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner) provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par

with specie for freight and passenger travel.

"That all treasury warrants and bonds and coupons of the State, so received into the State treasury, shall be canceled; and the comptroller shall issue the bonds of the State, bearing six per cent. interest, to the special school fund for the amount so paid in; and this act take effect from its passage." (Gen. Laws of Texas, 10th Leg., Second Extra Session, p. 14.)

In pursuance of these three Acts of the Legislature of December 16, 1863, May 28, 1864, and November 15, 1864, the Houston and Texas Central Railway Company and the Washington County Railroad Company each received State treasury warrants at par for freight and passage upon the lines of their respective railways at the rates then established by law, and in compliance with the terms of said acts the presidents of each of said companies posted in a conspicuous place in the railroad offices and in the passenger cars of said companies the provisions and terms of the said Act of May 28, 1864 (Record, p. 11).

During the year 1864 the Houston and Texas Central Railway Company paid the sinking fund and the interest then due by it with the treasury warrants of the State as authorized by the said Acts of the Texas Legislature, the aggregate

amount of the payments made by it during said year being $105,774.35 (Record, pp. 115–126). The Washington County Railroad Company during the years 1864 and 1865 paid with the treasury warrants of the State of Texas the sinking fund and interest due by it, amounting in the aggregate to the sum of $47,090.20 (Record, pp. 127–131).

The treasury warrants so paid by the said railroad companies were received by the State of Texas in full satisfaction and payment of the interest and sinking fund due from them at the time of payment, and credit therefor was given said railway companies by the State Comptroller and Treasurer upon the books of their respective departments and the warrants were canceled as required by said acts, and the Comptroller and Treasurer of the State of Texas thereupon, as required by law, issued the bonds of the State, bearing six per cent. interest to the "Special School Fund" for the amounts so paid by the railway companies in such treasury warrants (Record, p. 12).

In other words, the State of Texas agreed to receive from the railway companies, whose properties are now owned by the plaintiff in error, treasury warrants in payment of the principal

and interest upon the loans made to them by the State from the "Special School Fund," if said railroads would receive said "State treasury warrants at par for freight or passage at the prices or rates established by law." The railway companies accepted the offer of the State, and did receive treasury warrants at par for freight and passage upon their lines of railroad. The State, as it agreed to do, thereupon received from said railway companies treasury warrants in payment of the interest and sinking fund due upon the loans from the "Special School Fund," and gave the companies credit therefor upon the books of the Comptroller and Treasurer of the State. That is to say, there was a complete executed contract between the State of Texas and the Houston and Texas Central Railway Company and the Washington County Railroad Company. The offer made by the State was accepted by the railway companies, and the State fully performed its part of the contract by giving the railway companies credit in its loan account against them for the amount paid by them in treasury warrants. Nothing remained to be done by either party to the contract, and the rights of the railway companies resulting

from the execution of the contract—viz., the credits given them upon their indebtedness to the State arising from the loans out of the "Special School Fund"—were complete and vested.

The railroad companies of the State after the war, and prior to 1870, were unable, as a result of the war, to pay the sinking fund and interest accruing after the payments made by them in treasury warrants, and on August 13, 1870, the Legislature passed a General Act which provided " that any railroad company indebted to the State for loans from the Special School Fund may avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment in addition on said first day of November of one per cent. upon said aggregate amount to be applied toward the sinking fund provided for by existing laws in respect to said loans," and by making a similar payment on the 1st day of May and November in each year thereafter until the

entire loan had been paid (Gen. Laws of Texas 1870, page 85; see Appendix to Brief, p. 20).

It is not entirely clear from the record just when the accounts between the railroad companies and the State were restated, and the railroad companies recharged with the amounts which they had paid in treasury warrants and for which they had received credit upon the books of the State. In the opinion of the trial Court it was said that the accounts had been restated on May 1, 1870, and that the Act of August 13, 1870, referred to the condition of the accounts as restated. To quote the words of the District Judge, "if a contrary construction of this Legislature is to be adopted, it must be assumed that the accounts were restated and the railroads recharged with the payments made in treasury warrants on May 1, 1870, as that is the date of the entries on the books, and as there is no other evidence of the date of restating these accounts. Hence, the acts mentioned may have referred to the condition of the accounts after they were restated" (Record, p. 68). The trial Judge also found as a fact "that said payments in treasury warrants were charged off the account, and the account of

the State with the defendant railroad company was restated May 1, 1870, so as to ignore said payments in treasury warrants" (Record, p. 71).

Whether the view of the State District Court that the accounts between the railroad companies and the State had been restated on May 1, 1870, is correct, or whether such accounts were restated after the passage of the Act of August 13, 1870, would not seem to be particularly material in the determination of this case. It is, however, certain that when the railroad companies offered to make the first payment under the Act of August 13, 1870—to wit, on November 1, 1870—the Comptroller of the State of Texas, with the concurrence and approval of the Governor thereof, falsely stated the amount of the indebtedness due by the Houston and Texas Central Railway Company on the 1st of May, 1870, at $657,324.35, instead of $551,550, which last-named sum was the true aggregate amount then due on the loans to said railway company from the Special School Fund; and the amount of the indebtedness due by the Washington County Railroad Company on May 1, 1870, at $103,840.01 instead of $49,800, which latter sum was the true aggregate amount of said indebtedness

as it stood before the accounts between the railroads and the State of Texas were restated, and the amount of each indebtedness, as stated by said Comptroller, could only be computed by recharging each of said railway companies with the several amounts paid by them in treasury warrants and canceling the credit which had theretofore been given them by reason of such payments (Record, p. 17).

Thereupon the said Governor of the State of Texas demanded that the Houston and Texas Central Railway Company should pay on the 1st day of November, 1870, and on the first day of May and November in each year, thereafter, six months' interest and one per cent. as a sinking fund on $657,324.35, instead of on only $551,550, and that the Washington County Railroad Company should pay on the 1st day of November, 1870, and on the 1st day of May and November in each year, thereafter, six months' interest and one per cent. as a sinking fund on $103,840.01 instead of on only $49,800, which latter sum was the true aggregate amount of its indebtedness upon the school-fund loan as it stood on the 1st day of May, 1870; and, upon the refusal of said railway companies to accede to the said demands

of the Comptroller and Governor of the State of Texas, the Governor threatened to proceed and in fact did proceed to advertise and sell in the manner provided by the Acts of August 13, 1856 (see Appendix, p. 11 *et seq.*), and of August 13, 1870 (see Appendix, p. 20), all the railroad property and franchises of each of said railway companies on which a lien had been created to secure the payment of the aforesaid loans to them (Record, pp. 17 and 18). The said railway companies, being without adequate relief against this threatened action of the State of Texas through its Governor, were forced to yield and compelled to submit to its unjust demands, and the said Houston and Texas Central Railway Company was forced and compelled by the State of Texas to pay a two per cent. per annum sinking fund and six per cent. interest upon a computed aggregate amount wrongfully claimed by the State of Texas to be due by said railway company on the 1st day of May, 1870, of $657,324.35 instead of $551,550, the true amount, and the Washington County Railroad Company was compelled to pay a two per cent. per annum sinking fund and a six per cent. per annum interest on a computed aggregate amount claimed by the State of Texas

to be due by said railroad company of $103,-840.01 instead of $49,800, the just and true amount then due. At the time of each of said payments by said railroad companies of said sinking fund and interest, there was filed a written protest with the proper officers of the State of Texas against such unlawful demand and exaction (Record, p. 134).

In obedience to such unlawful demands of the State of Texas the Houston and Texas Central Railway Company was compelled to pay the amount of $975,356.21 (Record, p. 22) and the Washington County Railroad Company the amount of $68,738.30 (Record, p. 22), and the said railway companies claimed that such payments of said amounts were in full satisfaction and discharge of any and all indebtedness on their part to the State of Texas on account of said school-fund loans to them. The last payment made by either of said railway companies on account of said sinking fund and interest was made by the Houston and Texas Central Railway Company on the 9th of November, 1893 (Record, p. 22).

Thereafter, and on or about the 8th of December, 1894, the State of Texas filed its original petition against the Houston and Texas Central

Railroad Company in the District Court of Travis County, Texas, to recover a balance alleged to be due upon a loan of a part of the Special School Fund made by the State of Texas to the Houston and Texas Central Railway Company and the Washington County Railroad Company and to foreclose the lien, provided by the statutes of the State under which the loans were made, upon the property formerly owned by those companies and now owned by their successor the Houston and Texas Central Railroad Company (Record, p. 1). The theory upon which this suit was based was that the said railroad companies were not entitled to any credit for the amounts paid by them in pursuance of the provisions of the Acts of the Legislature of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, and that a proper construction of the Act of August 13, 1870, required that the amount due upon said school-fund loans to said railway companies on the first day of May, 1870, should be computed by canceling and disregarding the payments by said railway companies in treasury warrants under the provisions of said Acts of 1861, 1863 and 1864.

An answer to this petition was filed by the

defendant on the 15th of May, 1895, in which it was claimed that the executed contract between the State of Texas and the Houston and Texas Central Railway Company and the Washington County Railroad Company, arising under the said Acts of the Texas Legislature of 1861, 1863 and 1864, was within the protection of Article I., Section X., of the Constitution of the United States, and that its obligation could not be impaired by any act of the Legislature of the State of Texas (Record, p. 21), and that said defendant company had been deprived without due process of law of its property; viz., the credit given to it by the State of Texas at the time of the payment of the school-fund loan in treasury warrants under the terms of the said Acts of 1861, 1863 and 1864 (Record, p. 5).

The State of Texas thereupon filed what is called its "First Supplemental Petition" and alleged:

(1) That the acts of December 16, 1863, May 28, 1864, and November 15, 1864, were null and void in this:

> "That they specifically attempted to authorize the destruction and diversion of a special fund given to the State of Texas by the Federal Congress for special purposes and by previous act of the legislature set apart as the special school fund, and that

> the said public schools of Texas had a vested right in said fund, and that the legislature had no subsequent authority to destroy said fund" (Record, p. 24).

(2) That the treasury warrants in which the railroad companies "did pay a portion of the debts" were null and void.

> "Because said warrants were bills of credit emitted by the State and therefore violative of Section 10, Article 1, of the Constitution of the United States" (Record, p. 25).

In the prayer of this first supplemental petition it was asked that the credit given to the railroad companies upon the books of the State for the treasury warrants should be canceled and discharged, and there arose under such petition for the first time and as part of the plaintiff's case a controversy under the Constitution and laws of the United States (Record, p. 24 *et seq.*).

Immediately upon the filing of said first supplemental petition by the State of Texas setting up such controversy under the Constitution and laws of the United States the defendant company filed a petition with a good and sufficient bond praying the removal of the cause to the Circuit Court of the United States for the Western District of Texas (Record, p. 30 *et seq.*).

The application was made upon the ground that the suit was one arising under the Constitution and laws of the United States, as appeared from the plaintiff's own pleadings and statement of its own case. The application to remove the cause was denied by the Court, and the defendant duly excepted thereto (Record, p. 38).

After the denial of the motion to remove the case to the United States Circuit Court for the Western District of Texas there were various pleadings filed by both parties, the case was tried without a jury, and a judgment was entered therein on the 29th of February, 1896, in favor of the State of Texas for the sum of $673,109.56 (Record, p. 73), and a lien was declared upon the entire line of railroad and appurtenant property owned by said company and upon its corporate rights and franchises, and the same was foreclosed and said property ordered to be sold to satisfy said judgment (Record, p. 74).

There was no conflict in the evidence, and the facts established were substantially as follows:

FIRST. It was admitted that the loans were made originally and the bonds therefor executed as alleged in the State's original petition (Record, p. 96).

SECOND. The consolidation of the Washington County Railroad Company with the Houston and Texas Central Railway Company prior to 1870 was admitted (Record, pp. 96, 97), and it was also shown that plaintiff in error, the Houston and Texas Central Railroad Company, was incorporated August 1, 1889, under the General Laws of Texas, by the purchasers of the railways of the Houston and Texas Central Railway Company and Washington County Railroad Company at foreclosure sale (Record, p. 97).

THIRD. Each and all of the payments on account of the loans described in plaintiff's petition, and pleaded in the answer of the defendant, were shown to have been made as therein alleged, including the payments made in treasury warrants (Record, pp. 115–134).

FOURTH. It was shown that the payments made by said companies in treasury warrants, as pleaded by defendant, were accepted by the Comptroller and Treasurer of the State, and that credit therefor was at the time duly given by the Comptroller on the books of his department (Record, pp. 115–134).

FIFTH. It was shown that the aggregate amount due, as said aggregate amount stood on

the first day of May, 1870, on the books of the State of Texas, on account of the loans described in plaintiff's petition, were the balances remaining after allowing said companies credit for all amounts theretofore paid by them, as pleaded in the answer of the defendant, including the amounts paid as therein alleged, in State treasury warrants, and not the amount alleged in the State's petition as the balance due May 1, 1870 (Record, pp. 115–117 and 127, 128).

SIXTH. It was shown that by allowing credit for the payments in treasury warrants, as pleaded by defendant, and shown to have been made as alleged by it, as well as for the other payments therein pleaded, the entire indebtedness declared upon in the State's original petition was satisfied and discharged, and that, disregarding such payments in treasury warrants, and disallowing credit therefor, there would be due the State the amount claimed to be due as the balance of such indebtedness, as alleged in the State's petition (Record, pp. 115–117 and 127, 128). This is a matter of calculation from the statements of the Comptroller (Record, pp. 115–134).

SEVENTH. The payments subsequent to May 1, 1870, were exacted by the Comptroller and

Governor without regard to the payments theretofore made in treasury warrants, and as if no such payments had been made, and on a basis of the indebtedness without allowing credit for such payments, and each of the payments so exacted was made under protest, and notice of protest in writing was filed with the Comptroller at the time of each payment (Record, pp. 134, 135).

EIGHTH. It was shown that the six per cent. bonds of the State, issued by the Comptroller and Treasurer under the provisions of the aforesaid Acts of December 16, 1863, May 28 and November 15, 1864, to and for the benefit of the "Special School Fund," for the amounts paid under said acts by railroad companies on account of their indebtedness to said "Special School Fund," were paid, principal and interest, to the School Fund in August, 1883, out of the general revenue of the State, and in pursuance of an Act of the Legislature approved February 15, 1883 (Record, p. 188).

NINTH. It was shown that there was, at the time of the trial, in the basement of the Comptroller's Office in the Capitol Building at Austin, a large number of canceled treasury warrants

purporting to have been issued during the war, —some for civil service and others for military service—but there was nothing whatever on them, or on the records of the Comptroller's Office, to indicate, and no evidence was offered to show in any way, how they came into the custody of the Comptroller, or when or from whom or for what purpose they were received at the Comptroller's Office (Record, pp. 179–184).

TENTH. It was shown that there was nothing on the books or records of the Comptroller's or Treasurer's department of the State showing the date, denomination or character of any of the treasury warrants paid by said companies or used by them in making the payments shown to have been made by them in State treasury warrants on account of the loans described in plaintiff's petition, and nothing to show whether such warrants were issued before or after the commencement of the war in 1861, or, if after that time, whether they were issued for civil or military purposes, or the form, denomination or character of the warrants used in making the payments (Record, p. 184). Nor were any of such facts shown by any of the books, records or papers of the defendant, or by

books, records or papers in its possession or accessible to it (Record, p. 185).

An appeal was duly taken from the judgment of the trial Court to the Court of Civil Appeals for the Third Supreme Judicial District, and on the 9th day of June, 1897, the judgment was reformed so as to foreclose the lien only upon that part of the company's railroad which was in existence on August 13, 1870, together with all other property in connection therewith, such as depots, etc., and the franchises of that part of the road. A sale thereof was ordered to satisfy the amount of the judgment, but without rendering any judgment against the railroad company individually or personally for the amount of said debt. As thus reformed the judgment of the trial Court was affirmed (Record, p. 217).

A motion for a rehearing was thereafter duly made (Record, p. 219) and denied, whereupon an application was made to the Supreme Court of Texas for a writ of error, which was also denied. A motion for rehearing in the Supreme Court of Texas of the application for a writ of error, together with a motion to argue the application orally, was thereupon made and denied (Record, p. 272).

The case was then brought to this Court by a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District for the State of Texas, under the provisions of Section 709 of the United States Revised Statutes (Record, p. 314).

Assignment and Specification of Errors.

FIRST. The District Court of the State of Texas in and for Travis County erred in refusing the application of the Houston and Texas Central Railroad Company, one of the plaintiffs in error herein, to remove this case into the Circuit Court of the United States for the Western District of Texas, and in holding that said District Court was authorized to proceed with this cause after the presentation of the petition and bond for such removal.

SECOND. The said Court of Civil Appeals erred in overruling and holding not well taken said plaintiff in error's first assignment of error complaining of the action and ruling of the said District Court in refusing its application to remove this cause into the Circuit Court of the United States for the Western District of Texas, and in holding that said District Court was authorized to proceed with this cause after the presen-

tation of the petition and bond for such removal.

THIRD. The said Court of Civil Appeals erred in deciding against the validity of an authority exercised under the United States drawn in question in the cause.

FOURTH. The said Court of Civil Appeals erred in deciding against the title, right, privilege and immunity specially set up and claimed by said plaintiff in error under the Constitution and Statutes of and authority exercised under the United States.

FIFTH. The said Court of Civil Appeals erred in deciding in favor of the validity of statutes of and authority exercised under the State of Texas drawn in question in the cause on the ground of their being repugnant to the Constitution and laws of the United States.

SIXTH. The said Court of Civil Appeals erred in giving validity to the statute of Texas approved August 13, 1870, drawn in question in this cause under a construction thereof which impaired the obligation of the contract entered into between the State of Texas and the predecessors of the railroad company, plaintiff in error, under and by virtue of the provisions of the Acts of the Legislature of the State of

Texas, approved February 9, 1861 ; December 16, 1863 ; May 28, 1864, and November 15, 1864.

SEVENTH. The said Court of Civil Appeals erred in giving effect to the statute of August 13, 1870, as impairing the obligation of the contract previously entered into between the predecessors of the plaintiff in error and the State of Texas under and by virtue of the acts approved February 9, 1861 ; December 16, 1863 ; May 28, 1864, and November 15, 1864.

EIGHTH. The said Court of Civil Appeals erred in sustaining the validity of the authority exercised under the State of Texas by the Governor and Comptroller thereof in canceling and discharging credits for payments made under and in accordance with the provisions of the Acts of the Legislature of the State of Texas, approved February 9, 1861; December 16, 1863 ; May 28, 1864, and November 15, 1864, drawn in question in the cause, on the ground of its being repugnant to the Constitution and laws of the United States.

NINTH. The said Court of Civil Appeals erred in affirming the validity of the action of the State through the Governor and Comptroller in canceling and discharging credits given for pay-

ment made by the predecessors of said plaintiff in error under and in accordance with the said Acts of February 9, 1861; December 16, 1863; May 28, 1864, and November 15, 1864, whereby said plaintiff in error and its predecessors were deprived of their property without due process of law, contrary to the Constitution of the United States.

TENTH. The said Court of Civil Appeals erred in deciding in favor of the validity of the action of the State of Texas, which, if held valid, deprived the railroad company, plaintiff in error in this cause, of property without due process of law.

ARGUMENT.

FIRST POINT.

The District Court erred in denying the application of the defendant to remove this cause into the Circuit Court of the United States, and the Court of Civil Appeals erred in affirming such action of the District Court.

It will hardly be disputed that this suit is one arising "under the Constitution or laws of the

United States," and the only questions presented in regard to the application made to the State Court for the removal of the case to the Federal Court are:

FIRST. Did it appear, at the time of such application by the plaintiff's statement of its own claim, that the suit was one arising under the Constitution, laws or treaties of the United States?

SECOND. If it did, was the application made in time?

I.

AT THE TIME THE APPLICATION WAS MADE TO REMOVE THIS SUIT TO THE FEDERAL COURT IT THEN APPEARED FOR THE FIRST TIME BY THE PLAINTIFF'S STATEMENT OF ITS OWN CLAIM THAT THE CASE WAS ONE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The situation in the present case is this: The State of Texas filed its petition against the Railway Company (Record, p. 1) alleging that on the 1st day of May, 1870, there was due to it from the Houston and Texas Central Railway Company the sum of $657,324.35, and from the

Washington County Railway Company $103,-840.01, on account of loans made to said railroad companies out of the "Special School Fund." It then averred in the petition that certain payments had been made on account of said loans, and that there was a balance due upon the loan to the Houston and Texas Central Railway Company of $411,935.84, with interest, and on the loan to the Washington County Railroad Company of $86,655.90, with interest, and demanded judgment for the amounts so claimed to be due (Record, p. 4).

It does not, of course, appear by the plaintiff's statement of its claim in its original petition that this suit arises under the Constitution and laws of the United States.

In its answer the railroad company averred that it had paid the school-fund loan to the railroad companies, to the rights of which it had succeeded, and the whole thereof, and that there was not due to the State of Texas on the 1st day of May, 1870, from the Houston and Texas Central Railway Company, the sum of $657,-324.35, as alleged in the petition, but the sum of $551,550, or from the Washington County Railroad Company the sum of $103,840.01, as in the

petition alleged, but the sum of $49,800. The defendant further averred that under the acts of the Legislature of Texas approved on the 16th of December, 1863, May 28, 1864, and November 15, 1864, the said railroad companies had paid to the State of Texas on account of said school-fund loans $152,864.55 in treasury warrants, and that credit therefor had been given to said companies on account of said loans; and the answer averred that the amounts claimed in the petition of the plaintiff to be due upon said school-fund loans on the 1st of May, 1870, were computed by discharging and canceling the credit theretofore given to said railroad companies for said payments in treasury warrants, and that, if such credit to which the defendant was entitled was given, it would be found that said school-fund loans had been paid in full (Record, pp. 5–23).

The State of Texas thereupon filed what is called its "First Supplemental Petition" (Record, p. 24 *et seq.*) and alleged:

(1) That the Acts of December 16, 1863, May 28, 1864, and November 15, 1864, were null and void in this:

> "That they specifically attempted to authorize the destruction and diversion of a

> special fund given to the State of Texas by the Federal Congress for special purposes and by previous act of the legislature set apart as the special school fund, and that said public schools of Texas had a vested right in said fund, and that the legislature had no subsequent authority to destroy said fund" (Record, p. 24).

(2) That the treasury warrants in which the railroad companies "did pay a portion of the debts" were null and void.

> "Because said warrants were bills of credit emitted by the State and therefore violative of Section 10, Article 1, of the Constitution of the United States" (Record, p. 25).

We take it that it needs no argument to show that it appears by the plaintiff's statement of its own claim in its first supplemental petition that the suit is one arising under the Constitution and laws of the United States. As appears from the summary of the contents of this first supplemental petition which we have just given, there was presented for consideration and decision (1) the construction of the Act of Congress approved September 9, 1850 (9 Stat. at Large, 446), giving to the State of Texas $10,000,000 in stock in settlement of the controversy in regard to the

northwestern boundary of the State, and (2) the question of whether certain payments by the railroad companies were void by reason of the provisions of the United States Constitution in regard to the emission of bills of credit by a State.

The essential conditions to the right to remove a case of this character are that the case must be one arising under the Constitution or laws of the United States, and that this must appear at the time the petition for removal is filed from plaintiff's statement of his own case. These conditions are fully met in the present case. The real, original and only controversy in this cause is over the validity of the payments made by the railroad company during the war in State treasury warrants. The real object of the State's suit is to have those payments set aside and the railroad company compelled to pay in legal currency the portion of its indebtedness claimed to have been discharged by such payments. The sole matter in dispute, which gave rise to and necessitated this suit, was the validity *vel non* of the payments in treasury warrants. The State's right to recover the balance sued for, and awarded in the judgment brought here for re-

view, has from the outset depended upon whether or not the Court would sustain or set aside the payments. It rested originally with the State whether the case should be one cognizable in the Federal Courts or not. If it limited its attack upon the payments to objections not of a Federal nature, the State Court would alone have jurisdiction; but, if it resorted to the Constitution or laws of the United States for weapons of attack, it opened the door for removal of the cause to the Federal Court. It was not within the power of the State, by an elliptical statement of its case in its original petition and a tardy presentation of its grounds of recovery in supplemental pleadings, to urge rights under the Federal Constitution and laws, and at the same time defeat the right of removal to the Federal Court. The State had to choose between a removable cause and a relinquishment of the advantage of urging against the validity of the payments objections founded on provisions in the Constitution of the United States or in any Act of Congress. When it based its right to recover, at least in part, upon the prohibition in the Federal Constitution against the emission of bills of credit and upon the Act of Congress granting to it the funds out of

which the loans in question were made, the case became one arising under the Constitution and Laws of the United States, and hence removable into the Circuit Court of the United States.

It may be contended, however, on behalf of the State, that, in determining whether a cause is removable or not, only the plaintiff's original petition or complaint will be looked at, and not his amended or supplemental pleadings by which he reveals the real nature of his suit and sets up the rights and grounds of recovery upon which he relies. It is said that, although the State elected, and manifested its election by its own pleadings filed in a preliminary stage of the case, to rely upon provisions in the Constitution and laws of the United States to make out its case and assist its recovery of the money sued for, yet its case must not be considered as one arising under the Federal Constitution or laws because the State chose not to disclose this part of its case in its original petition. In this connection an effort is made to introduce a distinction, novel in the law of the removal of causes, between original and defensive statements by a plaintiff of his case. It is said that the rights claimed under the Constitution and laws of the United States

are not a part of plaintiff's original case, but that the assertion of them was rendered necessary by the defendant pleading the payments in treasury warrants; that if the railroad company had not set up the payments the State would not have relied upon the Federal Constitution and laws to avoid them. It might be said with equal force and relevancy that, if there had been no controversy, there would have been no suit. The fact of the payments and the necessity of avoiding them before the State could recover the alleged balance sued for were well-known facts which antedated and gave rise to the suit. The issue in this suit—the validity *vel non* of the payments during the war in treasury warrants—was inevitable.

It has long been settled by this Court that under the Acts of Congress approved March 3, 1887 (24 Stat. at Large, 552), and August 13, 1888 (25 Stat. at Large, 433), a case cannot be removed from a State Court into the Circuit Court of the United States as one arising under the Constitution and laws of the United States, unless that fact appears by the plaintiff's statement of his own claim (Tennessee vs. Union and Planters' Bank, 152 U. S., 454; Chappell

vs. Waterworth, 155 U. S., 102; Postal Telegraph Cable Co. vs. Alabama, 155 U. S., 482; Walker vs. Collins, 167 U. S., 57), but it has never been decided by this Court that the statement of the claim so showing the ground of removal to the Federal Court must necessarily be found in the very first pleading filed by the plaintiff.

It is true that in the case of Tennessee vs. Union and Planter's Bank, 152 U. S., 454, and the cases subsequently decided by this Court in accordance therewith, the statement has often been reiterated that, if it does not appear from the plaintiff's statement of his own claim that the suit is one arising under the Constitution, laws and treaties of the United States, " the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings " (Chappell vs. Waterworth, 155 U. S., 102, 108). Careful examination of all these cases will, however, disclose that the " subsequent pleadings " referred to by the Court were the pleadings of the defendant, and, as we understand it, all that this Court meant or intended to mean by those words was that the defendant could not create a removable case by setting up a Federal question as a defense, but that such a case could only come to this

Court under the provisions of Section 709 of the United States Revised Statutes. In other words, the decisions of this Court hold that to remove a case to the Federal Court from a State Court upon the ground that it is one arising under the Constitution and laws of the United States it must so appear by the plaintiff's statement of his own case, and not by what the defendant may say. We, however, find no rule laid down by this Court that such statement by the plaintiff must be in his first declaration, petition or complaint, and not in a subsequent supplemental or amended pleading filed by him.

The case of Smith vs. Greenhow, 109 U. S., 669, is not without interest in the present discussion. It is true that it was a removal case arising under the Act of 1875 (18 Stat. at Large, 470), but it is important as showing that in order to warrant a removal of a case to the Federal Court as one arising under the Constitution of the United States it is not necessary that it should so appear from the first pleading filed by plaintiff. It is enough if it appears in a subsequent pleading, so long as that subsequent pleading is a pleading of the plaintiff, and it is clear that the plaintiff invokes the aid of the

Constitution and laws of the United States in order to sustain his case.

The facts were as follows: The declaration containing a count in trespass for entering plaintiff's premises and carrying away his goods was filed in the Circuit Court of the City of Richmond. The plea set up that the goods were lawfully taken by defendant as collector to satisfy a tax. The replication averred that plaintiff before the levy, under authority of a State statute, tendered in payment of the tax coupons cut from the bonds of the State. The rejoinders set up a subsequent law of the State forbidding defendant to receive anything in payment of taxes but gold, silver, etc. To this rejoinder the plaintiff demurred. This demurrer, being the fifth pleading, was the one from which it appeared that the plaintiff's case arose under the Constitution. The plaintiff removed the case to the United States Circuit Court for the Eastern District of Virginia and the defendant moved to remand. The motion was granted and upon appeal to this Court the order granting the motion was reversed. Mr. Justice MATTHEWS, speaking for the Court, said at page 670:

"The ground on which the order of the

> Court below, remanding the cause, was placed, seems to have been that no Federal question, such as is necessary to confer jurisdiction in the case upon the courts of the United States, appears to be necessarily involved in the issue raised by the pleadings. In this we think the Court erred. The replication alleges that the coupons tendered contained an express promise, as required by law, of the State of Virginia, that they should be received in payment of all taxes due to the State. The rejoinder is that the Act of January 26, 1882, subsequently passed, expressly forbids the defendant from receiving such coupons in payment of taxes. The demurrer in effect denies the validity of that law, and upon the record no ground of its invalidity can be inferred, except that it is avoided by the operation of that provision of the Constitution of the United States which forbids any State from passing laws which impair the obligation of contracts. *It therefore sufficiently appears upon the record, that the plaintiff's case arises under the Constitution of the United States.*"

In Cooke vs. Avery, 147 U. S., 375, the plaintiff brought a suit in trespass to try title in the Circuit Court of the United States for the Northern District of Texas. The basis of jurisdiction in that Court was diversity of citizenship One of the defendants filed a plea to the juris-

diction of the Court. Thereupon the plaintiff filed an *amended original* petition, claiming title to the property in question under an execution sale upon a judgment recovered in the United States Circuit Court for the Northern District of Texas, and alleged in his petition that by reason of certain laws of the United States and rules of said Federal Court such judgment was a lien upon the property from the date of its rendition. It was held by this Court that the case was one arising under the Constitution and laws of the United States, *although such fact did not appear by the original petition, but by the amended original petition.* The Court said, after much discussion of the facts, at page 390:

> "The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject matter was properly invoked."

Although the Cooke case was not a removal case, but one originally brought in the Federal Court, yet its value as an authority in the present discussion is quite as great, for this Court has held in Metcalf vs. Watertown, 128 U. S., 586, that:

"Where the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, *it must appear at the outset, in order to give the Court jurisdiction, that the suit is one of which the Court, at the time its jurisdiction is invoked, can properly take cognizance*" (Syllabus).

See, also, Colorado Central Consolidated Mining Co. vs. Turck, 150 U. S., 138.

In Third Street and Suburban Railway Company vs. Lewis, 173 U.S., 457, it is clearly brought out that there is no distinction between a case of original jurisdiction and a removal case in regard to the requirement that it must appear by the plaintiff's own statement of his claim and not by anything which the defendant may say that the case is one arising under the Constitution and laws of the United States. Mr. Chief-Justice FULLER, who delivered the opinion of the Court, said at page 460:

"It is thoroughly settled that under the Act of August 13, 1888, c. 866, 25 Stat., 434, the Circuit Court of the United States has no jurisdiction, either *original* or by removal from a State Court, of a suit as one

> arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. * * * If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied *by anything set up by way of defense.*"

In fact, the decision in the Tennessee Bank case (*supra*) (Removal Case) was largely founded upon the Metcalf case (*supra*) (Original Jurisdiction Case) and both where original jurisdiction in the Federal Court is invoked on the ground that the case arises under the Constitution and laws of the United States and where the right of removal from a State to a Federal Court is claimed upon the same ground, it is insisted by this Court that such ground must appear at the outset—*i. e.*, it must appear from the plaintiff's statement of his own case; and, as we have shown by the Cooke case (*supra*), it has been so held to appear at the outset—*i. e.*, in the plaintiff's statement of his own case, when it appears for the first time in the *amended original* petition; viz., the second pleading on behalf of plaintiff, as in the case at bar.

It will be observed that, in the Metcalf case (*supra*), the Court, after holding that it had no jurisdiction upon the ground that it did not appear by the complaint that the case was one arising under the Constitution and Laws of the United States, said, at page 590: "It will be for the Court below to determine whether the pleadings can be so amended as to present a case within its jurisdiction." These words would be idle and have no meaning unless they mean, as it was subsequently held in the Cooke case (*supra*), that it was permissible to consider, in determining jurisdiction, not only the original but all supplemental and amended pleadings of *plaintiff* in order to ascertain whether the case was one arising under the Constitution and laws of the United States.

If the plaintiff in the case at bar had been content to rely on the petition as originally filed by it, it is very clear that there could have been no recovery. It alleged that certain amounts were due from the railroad companies on the 1st of May, 1870. In order to prove this allegation it was necessary for the State of Texas to show that certain payments made to it by the railroad companies were void, and that said railroad com-

panies were not entitled to the credit therefor which appeared on the books in the office of the Comptroller of the State, and that such payments were void by reason of the Act of Congress of September 9, 1850 (9 Stat. at Large, p. 446), and because of the provision of the Constitution of the United States relating to the emitting of bills of credit by a State, as was alleged in the first supplemental petition filed by the State of Texas.

The first supplemental petition of plaintiff was not a reply to the answer of the defendant. In the first place no reply is required by the statutes of Texas, which provide that:

> "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted" (Art. 1193, Rev. Stat. of Texas of 1895).

Further than that, suppose the defendant had simply filed a general denial instead of the full answer which it did interpose, would it not have been incumbent on the plaintiff to have amended its petition in order to allege a good cause of action? Would it not still have been obliged to

show that the payments made by the railroad companies under the Acts of 1863 and 1864 were void, and were void for the reasons stated in the first supplemental petition, and could it have done so unless such facts had been properly pleaded by it?

Nowhere is the rule to the effect that evidence offered must be supported by pleading averring the fact enforced more rigidly than in Texas.

Mims vs. Mitchell, 1 Texas, 443, 446.
Guess vs. Lubbock, 5 Texas, 535, 538.
McMullen vs. Guest, 6 Texas, 275, 283.
Roseborough vs. Gorman, 6 Texas, 313, 315.
Paul vs. Perez, 7 Texas, 338.
Thompson vs. Thompson, 12 Tex., 327–329.
Kelley vs. Kelley, 12 Texas, 452, 454.
Norvell vs. Oury, 13 Texas, 31.
Denison vs. League, 16 Texas, 399 408.
Texas B. & Ins. Co. vs. Stone, 49, Texas, 415, 16.
Grothaus vs. Witte, 72 Texas, 124, 126.

In *Mims vs. Mitchell*, *supra*, it appears that

the action was brought to recover the value and hire of a negro girl which, it was alleged, the defendant had failed to return to plaintiff, the owner, after the expiration of the time for which she had been hired. The defendant denied the allegations of the plaintiff, and alleged "that if plaintiff has suffered any loss he has accepted satisfaction for the same from the defendant, and that all hire has been punctually paid." In speaking of the insufficiency of the plea of accord and satisfaction, and the necessity of alleging every fact relied upon, the Court, which really established the system of Texas pleadings, said (1 Texas, 446, 447):

> "More especially is this true in reference to the pleadings under our system, where the technical *general issues* of the English system, adapted to their forms of action, each constituting the foundation for its own peculiar evidence and defense, are unknown. Under the *general issues*, as recognized in that system, matters of defense admissible in one form of action may be inadmissible in a different form of action. But, with us, neither the distinctions of the *forms* of action, nor the *general issues* exist; but our pleadings really are, or are intended to be, what the English pleadings are defined to be: *The statement in a*

legal and logical manner of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense, or the written statement of those facts, intended to be relied on as the support or defense of the party in evidence (3 Term R., 159). A general traverse or denial, in our system, is not to lay a foundation for the introduction of new affirmative matter in evidence, but simply to throw upon the plaintiff the burden of proof. Its office here is not to let in proof of independent facts, which shall constitute a defense, but to require the plaintiff to prove the truth of every averment material to his cause of action. But if the defendant is in the possession of facts which, admitting the averments in the petition to be true, show that the plaintiff still has no cause of action, as that (in the present instance) the slave had come to her death without any fault in him or his agents, and that, therefore, he is excused from restoring her to the owner and exonerated from any responsibility in consequence of his failure, these facts should be specially averred and pleaded; otherwise, the defendant ought not to be permitted to avail himself of them in proof."

All these cases go to show that whatever may be the right under the common-law system, or any other system of pleading, to introduce new

affirmative matter in evidence under the general traverse or denial, no such right has ever existed under the Texas system, but every fact relied on, either by the plaintiff or the defendant, must be pleaded. Under Article 1193 of the Revised Statutes of 1895, above quoted, it is not necessary for the plaintiff to deny the allegations of the defendant's answer, but under such implied denial of the defendant's answer the plaintiff cannot introduce anything not pleaded in his original petition, but must present the same by an amendment of his pleadings, and it is not material whether it is presented in the form of a substituted petition in lieu of his previous petition or by a supplemental petition. In either event it is a part of his case to be established by the evidence.

Prior to the filing of the State's first supplemental petition there was nothing in the pleading indicating any vice in the warrants used in making the payments in question. The evidence afforded by the State's own books was also free from taint; hence, if the State, standing upon its original petition, had offered evidence to show that the warrants used in making the payments were in form, or otherwise, illegal

as bills of credit emitted contrary to the Constitution of the United States, an objection would have lain thereto upon the ground that the fact thus sought to be established had not been pleaded. It was therefore essential to recovery by the State that the right it relied upon under the Federal Constitution to avoid these payments should be pleaded in order to admit proof of the same, and that pleading and proof of the right claimed under the Federal Constitution was as much a part of the State's case as the existence of the indebtedness in the first instance.

Since, then, the State's case—not only as it actually existed and as it was well understood by all parties from the beginning of the litigation to the present time, but also, as disclosed by its pleadings, as necessary to its recovery—was one depending for success upon a provision of the Federal Constitution, the right of the defendant, by timely action, to remove the cause to the Federal Court, would seem to be clear. Can this right, under the Federal Constitution and laws, be impaired or taken away merely by a form of procedure provided or sanctioned by State laws?

It is true, as observed by this Court in *Texas, and Pacific Railway Co. vs. Cody*, 166 U. S., 606

that a plaintiff may run his own risk in respect of the cause of action on which he proceeds, and he may, if he chooses, at his peril, omit a ground arising under the Federal Constitution or an act of Congress.

But if he is not willing to take such risk, and deems it safer to rely upon the Federal ground also, he does so subject to the right of his adversary to invoke the Federal jurisdiction.

Here the State did not see fit to rely upon the skeleton presented by its original petition; indeed, it could not have done so and have prevailed, as we have already shown. It deemed it necessary to invoke the Federal Constitution as a part of its case.

Now, we take it that it is not material, with respect to the right to remove, when or in what manner the plaintiff presents the Federal right, if it clearly appears that it is a part of his case and is one of the grounds relied upon for recovery.

Surely, the plaintiff cannot by presenting his case under the sanction of State practice, in different instruments, designated by arbitrary names and at different stages anterior to the trial, deprive the defendant of the right to re-

move to the Federal Court a case which appears from plaintiff's entire pleadings, regardless of their number, names or form, to be one arising under the Constitution or laws of the United States.

In other words, the question before the Court is whether a plaintiff can deprive a defendant of his constitutional right to a trial in a Federal Court of a case under the Constitution and laws of the United States by simply leaving out any reference thereto in his declaration, petition or complaint, and then, after the defendant has answered, filing another pleading showing his case to be of such a character, but insisting that, as it did not so appear in the original complaint, the defendant under the line of cases beginning with Tennessee vs. Union and Planters' Bank, 152 U. S., 454, could not remove the suit to the Federal Court.

In the case of Texas and Pacific Railway Co. vs. Cody, 166 U. S., 606, 609, it was said that "plaintiff * * * cannot cut off defendant's constitutional right, as a citizen of a different State than the plaintiff, to choose a Federal forum, by omitting to aver, or mistakenly or falsely, stating, the citizenship of the parties,"

and we respectfully submit that this Court never intended to be understood as holding in the Tennessee Bank case and Chappell vs. Waterworth (*supra*) that a plaintiff could cut off a defendant's constitutional right to choose a Federal forum for the trial of a case which was in fact one arising under the Constitution of the United States by omitting in his declaration or petition to aver all the facts constituting his cause of action and by supplying such omission in a subsequent pleading.

Just such a case as the present was in the mind of the Court in the case of Walker vs. Collins, 167 U. S., 57, when, speaking through Mr. Justice WHITE, it said, at page 59:

> "As in the complaint in the case at bar there are no facts averred showing that the controversy was one arising under the laws of the United States, *and it was not essential to the statement of the cause of action that such facts should be averred*, the case comes directly within the operation of the ruling cited."

It would seem that but one inference can be drawn from the words underscored in the quotation just given. That is to say, if an honest statement of the plaintiff's cause of action would

require that reference should be made therein to the Constitution and laws of the United States, if it is essential to the statement of the cause of action that such reference should be made, then, as we read these words of Mr. Justice WHITE, the plaintiff cannot leave such essential facts out of his complaint and then insert them in a subsequent pleading, and so defeat the defendant's constitutional right to try the case in a Federal forum.

Such was the line of argument in Oregon Short Line, &c., Railway vs. Skottowe, 162 U. S., 490, although the right to remove the case to the Federal Court was denied. The Court there said that the facts omitted from the complaint were not "necessary for the plaintiff to prove to maintain her action."

We therefore submit with confidence that it appears from the statement of its own claim within the meaning of the Tennessee Bank case (*supra*) and subsequent decisions of this Court that the case of the State of Texas is one arising under the Constitution and laws of the United States, and that the only question for the Court to determine is whether the application to remove the case to the United States Circuit Court for the Western District of Texas was made in time.

II.

THE APPLICATION TO THE STATE COURT TO REMOVE THE CASE TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF TEXAS WAS MADE IN TIME AND SHOULD HAVE BEEN GRANTED.

The case, as stated in the original petition of plaintiff, was not removable to the Federal Court, and the defendant, at the time or any time before it was required to answer or plead to said petition, could not have made application to the State Court for a removal of the case on the ground that it appeared, from the plaintiff's statement of its own claim, that the case was one arising under the Constitution and laws of the United States.

The question which now arises is whether the defendant's application to remove is made too late, if made as soon as it appears from the plaintiff's statement of its own case that it is a removable case. In other words, is the constitutional right of the defendant to try a case of this character in a Federal Court to be taken from him because he has not performed a mere matter of practice, which not only was not in his power

to perform, but was placed beyond his power to perform by the act of the plaintiff?

It is to be observed that the very day the plaintiff filed its first supplemental petition, for the first time pleading the facts upon which it relied to prove its case, and for the first time alleging the facts essential to make out its cause of action, the defendant presented its petition and bond for the removal of the cause to the United States Circuit Court for the Western District of Texas. The moment the case became removable, as one arising under the Constitution and laws of the United States, the application was made to bring it into the Federal Court.

It is of course true that the Act of August 13, 1888 (25 Stat L., 433), provides "that whenever any party entitled to remove any suit * * * may desire to remove such suit * * * he may make and file a petition * * * at the time, or any time before the defendant is required by the laws of the State * * * to answer or plead to the declaration or complaint."

The important words in this act to now consider are the words at the beginning of the section. They are "whenever any party entitled to remove any suit" desires to bring it into the Fed-

eral Court he must file his petition at the time, or any time before he is required to answer. The difficulty in the case at bar is that defendant "was not entitled to remove" the suit up to the time of filing its answer, and did not become entitled to do so until the first supplemental petition was filed, when the application was at once made. It would therefore seem that the requirement of filing the petition for removal by the defendant before the time to answer the declaration, petition or complaint must be construed with reference to the words "entitled to remove," and that the limitation of time for presenting the petition will only be enforced if during the period the defendant was also "entitled to remove." If during such period of limitation the defendant was not "entitled to remove," then the requirement that the application for removal must be made before the time to answer has expired does not apply to the case, and the defendant is permitted to remove a case, not removable at the outset, whenever it becomes removable, so long as the application is made as soon as the case could be brought to the Federal Court.

In the present case it would not be a very broad or strained construction of this statute to say that,

when the defendant was not "entitled to remove" a case until after the plaintiff had filed his amended declaration, petition or complaint, the law intended that defendant should have until he was required by law to answer such amended complaint within which to apply for a removal of the case to the Federal Court, for not until the time of filing the amended complaint did the essential condition of the imposition of the time limitation exist—to wit, that the defendant was "entitled to remove" the case.

Such was the view of the Removal Act taken by the United States Circuit Court for the Northern District of Texas in Evans vs. Dillingham, 43 Fed. Rep., 177. This case is important inasmuch as it is one arising under the Texas practice where the plaintiff does not seem to be required to state his cause of action in his original declaration or petition, but is permitted to wait until some subsequent pleading. In fact, in the case cited the cause of action was not stated by plaintiff until he had filed his *second* amended petition, and Judge McCormick very properly, as it would seem to us, held that the limitation of time for the presentation of a petition for the removal of a case to the Federal Court began to run from the time

of filing the amended petition which stated the plaintiff's cause of action. He said at page 180:

> " But the defendant also urges that plaintiffs' original and first amended petition presented no cause of action against the defendant, and that the second amended petition now constituting the petition of plaintiffs, he certainly could not be required to answer before the first day of the first term of the Court after it was pleaded, on which day his application for removal was made. It appears from an inspection of the pleadings that the original and first amended petition do not show any privity of the plaintiffs in the contract on which this suit is based. * * * There is no question in my mind that, where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff. As an illustration of the propriety and necessity of so holding, take the case where a party sues in the State Courts, alleging the cause of controversy to be of less value, or not of greater value, than $2,000, and after the return term, and after the defendant has answered, the plaintiff files an amended petition, setting up the same cause of action, but claiming damages in a sum exceeding $2,000, can it be doubted that, if the state of the parties or the cause

> of action be such as to have given the right to remove had the amount in controversy been sufficient to give this Court jurisdiction, the defendant would not be denied his right to remove because the time within which he was required to answer the original petition had passed?"

In the case of Yarde vs. Baltimore and Ohio Rd. Co., 57 Fed. Rep., 913, 915, the same rule was again well stated as follows:

> "This right [of removal] cannot be defeated by any artifice, evasion or omission. If at any time during the progress of an action in a State Court, by amendment or otherwise, a cause of action not before removable is changed or converted into one which is properly removable, the defendant * * * has the right to file his petition and bond and secure a removal of the cause into the proper Federal Court."

The question of whether an application for the removal to a Federal Court of a case not theretofore removable is presented too late when made after the time of the defendant to answer the original declaration or complaint has expired, is, as we understand the reasoning of the Court in Powers vs. Chesapeake and Ohio Railway, 169 U. S., 92, no longer an open question. The facts in the Powers case are perhaps not identical

with the situation as it comes now before the Court, but the rule as there given permitting such removal after the time for answering the complaint has expired is for the reasons stated as applicable to the case at bar as to the Powers case. The only difference between the two cases is that the Powers case became a removable case *after the time of the defendant to answer had expired* by reason of diverse citizenship, resulting from the discontinuance of the case as to certain defendants, citizens of same State as plaintiff, while the present case became a removable case *after the time of the defendant to answer had expired*, by reason of the case then for the first time appearing to be a case arising under the Constitution and laws of the United States because of the statement of plaintiff's own claim in its supplemental petition.

In the Powers case it appeared that the plaintiff brought an action to recover damages for personal injuries in the State Court of Kentucky against the Chesapeake and Ohio Railway Company, and the conductor, engineer and fireman of the railway train which injured him. Before the time of the defendant railway company to answer the complaint had expired, it removed

the case to the Circuit Court of the United States for the District of Kentucky. A motion to remand the case was made by plaintiff, and was granted upon the ground that there was no separable controversy between plaintiff and the railway company, and that, as the other defendants were citizens of the same State as the plaintiff, no removable case was presented by the record.

A year after the first petition for removal was presented, and when the case was called for trial, the plaintiff discontinued his action against the individual defendants, leaving the case one between a citizen of Kentucky on the one side and a foreign corporation on the other, and clearly removable into the Federal Court. The railway company then filed a second petition for removal, which the State Court denied. The railway company excepted to the denial, and the case proceeded to trial, resulting in a verdict and judgment for plaintiff, from which judgment the defendant company appealed to the Court of Appeals of the State.

The railway company filed a transcript of the record of the proceedings in the State Court in the Circuit Court of the United States for the District of Kentucky at the next term of that

Court, and the plaintiff moved to remand upon the ground, among other things, that the petition for removal was not filed in time. The motion was denied, it being held by the Court that the application to remove was, under the circumstances of the case, made in time.

The case was afterwards called for trial in the Circuit Court of the United States, and the plaintiff declined to proceed to trial upon the ground that the Court was without jurisdiction because the case had been improperly removed thereto. The Court thereupon dismissed the action and rendered final judgment for defendant. The plaintiff then sued out a writ of error from this Court upon the sole ground that the cause was not properly removed into the Federal Court and that therefore the Court was without jurisdiction. The judgment of the lower Court was affirmed by this Court in an opinion delivered by Mr. Justice GRAY, in which he said, at page 98:

> " Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts. * * *

" But it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all. * * *

" The question whether a defendant may file, in the State court in which the suit was commenced, a petition for removal, after the time mentioned in the Act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication ; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place.

" In order to warrant a removal from a court of a State into a Circuit Court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the Circuit Court of the United States must exist. It is only when that does exist that 'any party entitled to remove any suit' 'may make and file a petition in such suit in such State Court at the time, or at any time before the defendant is required by the laws of the State, or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court, to be held in the district where such suit is pending,' and to give bond to file a copy of the record in that court, 'on the first

day of its then next session' (Act of March 3, 1887, c. 373, as corrected by Act of August 13, 1888, c. 866, 25 Stat., 435).

"This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the Act of Congress, that 'any party entitled to remove any suit' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same State as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2,000, and was afterwards discovered to be so much graver, that there could be no doubt of the power and the duty

of the Court to allow an amendment increasing the *ad damnum*.

"The reasonable construction of the Act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.

"The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time.

* * * * *

"It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal

into the Circuit Court of the United States; and this petition was rightly permitted to be amended in that court."

It would, therefore, seem clear, under the decision in the Powers case, that the application to remove this case to the United States Circuit Court for the Western District of Texas was made in time, although made after the time of the defendant to answer the original petition of the plaintiff had expired.

SECOND POINT.

This Court will determine for itself whether there was a valid contract between the State and the Houston and Texas Central Railway Company and the Washington County Railroad Company, by virtue of the Acts of the Texas Legislature, approved February 9, 1861; December 15, 1863; May 28, 1864, and November 15, 1864, independently of the judgment of the State Court respecting the existence and validity of such contract.

The Acts of 1861, 1863 and 1864 were in effect an offer on the part of the State of Texas to receive treasury warrants in payment of the school-fund loan, if treasury warrants were first re-

ceived by the railroad companies "at par with specie for freight and passenger travel."

The time for paying the interest and sinking fund having been extended by the Act of January 11, 1862 (Appendix, p. 19), until January 1, 1864, no payments were made in warrants prior to that time. In order, therefore, to use warrants in making the payment in question, it was necessary, under the Acts of 1864, that the Railroad Company should receive warrants at par with specie in the payment of freight and passenger fares. The warrants were at a large discount. Railroad companies, however, received them at par with specie, as required by the acts referred to. The acts required the Comptroller to ascertain whether they had done so before accepting warrants in the payments of the loans, and made him the exclusive judge of the fact. It is not open to dispute that they did receive them, for the Comptroller so found, as evidenced by his acceptance of the warrants and his allowance of credit therefor at the time upon the books of the State (Record, p. 115 *et seq.*), and of course the regularity of his action in the premises and the performance by him of the duty enjoined upon him by the acts of the Legislature will be pre-

sumed. Indeed, this has never been disputed, but it has been assumed throughout by all parties that the Comptroller properly performed his duties and satisfied himself that the Railroad Companies had accepted warrants at par with specie in the payment of freight and passenger fares, as required by the Acts of 1864, and had complied with all the conditions of those acts as to the right to use the warrants in making the payments.

It will, of course, not be doubted that the passage of the Acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, and the acceptance by the railroad companies of the offer thereby made, constituted a contract between the State and the railroad companies; and that, in the subsequent course of dealings between them, every time a payment was made to the State by the railroad companies in treasury warrants, such contract to the extent of such payment became completed and fully executed.

From the beginning of this litigation we have maintained that the obligation of the contracts arising in the manner indicated was impaired by the Act of August 13, 1870 (Record, p. 13);

but before taking up the discussion of this branch of the case it will, we think, be useful to understand clearly what the views of the Court below were upon the question of the contract between the State and the railroad companies.

Decision of the State Court.

The State Court, after disposing of the removal question to its satisfaction, goes on to say that "the only controversy between the parties" is "whether the payments made by the railway companies in State Treasury warrants are valid and binding upon the State" (Record, p. 213). It then decides that the Treasury warrants, in which the Special School Fund loans must have been paid (although it is not proved), were intended to circulate as money, and that they were, therefore, void under Sec. 8, Art. 7, of the State Constitution of 1845, and that the State was, therefore, not bound to allow the railroad companies credit for such payments made in obligations void under the State Constitution, and the Court in effect determined that there was therefore no contract between the State and the railroad companies to be impaired by any subsequent Act of the Legislature (Record, pp. 213 and 214).

This Court Can Take Jurisdiction.

It is claimed by the defendant in error that by reason of this decision by the State Court the judgment of which is now sought to be reviewed, there is no Federal question determined which would entitle this Court to take jurisdiction of the case under Section 709 of the United States Revised Statutes. The argument is that the State Court simply held that there was no contract between the State and the railroad companies and decided no question as to any subsequent legislation which is alleged by the plaintiff in error to impair the obligation of the contract. The Court below decided that there was no contract, and, as the other side maintain, such decision will be respected by this Court and in no way re-examined, even if this Court should not agree therewith, inasmuch as the non-existence of the contract is in no way concerned with the Federal question of whether the obligation of such contract, supposing it to have existed, had been impaired by a subsequent Act of the Legislature and is a matter for the State Court alone to determine.

It is, however, well settled by the decisions of this Court that when a case is brought here by writ of error to the highest court of a State upon the ground that the obligation of a contract made by the plaintiff in error has been impaired by a subsequent Act of the Legislature of the State, this Court will examine and determine for itself whether there is in fact a contract, and is not in any way bound by the decision of the State Court in that regard. If this were not so it would, as was said in McCullough vs. Virginia, 172 U. S., 102, 117, "always place it in the power of a State Court to determine our [this Court's] jurisdiction."

In the case of University vs. People, 99 U. S., 309, it appeared that a statute of the State of Illinois, passed in 1855, declared that all the property of the Northwestern University should be forever free from taxation. Subsequently and in 1872 an act was passed which the university claimed impaired the obligation of the contract arising under the Act of 1855, inasmuch as the assessors and the Supreme Court of the State had by their construction of the acts limited this exemption from taxation to land and other property *in immediate use by the institution.* The

Supreme Court of the State (being the highest court of the State) held that there was no valid contract between the university and the State of Illinois arising from the Act of 1855, inasmuch as such act was void by reason of its being in conflict with the State Constitution of 1848, and placed its decision entirely upon this ground. In the brief in this court of the Attorney-General as printed at page 317 of the report of the case it was said: "In this case it neither appears from the record, nor otherwise, that the decision of the State Court was based upon, or in any manner affected by, any law of the State passed subsequently to the making of the supposed contract." When the case came on for argument the Attorney-General moved to dismiss for want of jurisdiction, upon the ground that the State Court had simply held that there was no contract, and, therefore, nothing to be impaired by any subsequent law. The motion was denied, and the decision of the State Court was reversed. Mr. Justice MILLER delivered the opinion of the Court, and said at page 319:

> "This question of jurisdiction to review the judgments of State courts is so frequent, and the principles which govern it so well

settled, that we need not be very elaborate in our opinion on that point. The argument is that the judgment of the State Court is limited to a construction of the fourth clause of the amendatory charter of 1855, as it is affected by the Constitution under which it was enacted, and that whether that statute was a contract or not, or whether it was properly construed or not, it is still but the decision of a Court construing a contract or a statute, and there is no law of the State impairing the obligation of that contract within the meaning of the Constitution of the United States. * * *

"It is strenuously insisted that these provisions of the Constitution of 1870 and the revenue law of 1872 do not repeal the exemption as established by the fourth section of the amended charter of 1855, because that section was in excess of the authority conferred by the Constitution of 1848. But this depends on the construction of that contract as affected by the Constitution under which it was enacted. If by virtue of that Constitution the Legislature of that day could only exempt plaintiff's real estate so far as it was in immediate use for school purposes, as was held by the Supreme Court, then it may not repeal that statute or impair that contract, for the exemption will probably amount to the same thing under either statute. But if it is a contract, as is contended for by plaintiff's counsel,

which, under a true construction of the Constitution of 1848, exempts all the property of plaintiff which is held by it for appropriation to the purposes of the university as a school, as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote the purpose by leases, of which the rent goes to support the school, as in any other way, then the law of 1872 and the Constitution of 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855.

"Whether that contract is such as to be impaired by these later laws is one of the questions of which this Court always has jurisdiction. * * *

"Though the Court is here construing the Constitution of its own State, and is therefore entitled to our consideration on that ground, as well as for its character and standing for learning and ability, we find ourselves, in the performance of the duty of reviewing this case, compelled to differ with that Court in the nature and extent of the constitutional limitation of this contract, as made by the Legislature of the same State. For this Constitution necessarily becomes a part of the contract which is said to be impaired by subsequent legislation."

It is unnecessary to suggest to the Court the

unusual similarity of the Illinois case to the case at bar. In both, the highest Court of the State decided that there was no contract such as was claimed by the plaintiff in error in this Court by reason of certain prior provisions of the State Constitution, and in both cases the State Courts put their decision upon that ground without deciding any question as to the effect of any subsequent legislation. As the motion to dismiss for want of jurisdiction was denied in the Illinois case, it would seem that upon the authority of that decision the motion to dismiss in the present case should also be denied.

In the case of the Bridge Proprietors vs. Hoboken Co., 1 Wall., 116, the doctrine is most concisely stated in the syllabus as follows:

> "Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does not impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is 'drawn in question,' and the decision is 'in favor' of its validity, within the meaning of the 25th section of the Judiciary Act of 1789."

In the case of Fisk vs. Jefferson Police Jury, 116 U. S., 131, the facts were as follows: Fisk, who was an attorney at law, brought three suits to recover the salary and fees due him from the Parish of Jefferson as District Attorney. He obtained judgments in each case against the police jury, which is the governing body of the parish. Not being able to obtain the payment of these judgments, he made application for writs of mandamus to compel the assessment and collection of a tax for the payment thereof. The writs of mandamus were denied by the Supreme Court of Louisiana, and the cases were brought to this Court upon the ground that the judgments dismissing the writs were founded upon the law of Louisiana which impaired the obligation of the contract of Fisk as District Attorney for the Parish of Jefferson.

It appeared that the services for which Fisk recovered judgments were rendered in the years 1871 to 1874 inclusive, and during this period there was in force an Act of the Legislature of 1871 under which Fisk was entitled to an assessment and collection of a tax for the payment of these judgments. Thereafter and before the application for the writs of mandamus was made

the Constitution of the State of 1880 declared that no parish tax for all purposes should exceed ten mills on the dollar of valuation. The police jury showed that they levied the full amount of taxes permissible under this clause of the Constitution, and the State Court held that they could not be compelled to levy more. It was decided that the employment of Fisk as District Attorney for the parish did not constitute a contract. This question was the only one discussed in the opinion, and on that ground the decision was rendered. The judgments of the State Courts were reversed by this Court, the effect of the decision being that the State Court could not defeat the jurisdiction of this Court simply by saying that there was no contract. The Court said, at pages 133 and 134:

> "In answer to the argument that, as applied to plaintiff's case, the constitutional provision impaired the obligation of his contract, *the Supreme Court decided that his employment as attorney for the parish did not constitute a contract, either in reference to his regular salary or to his compensation by fees. And this question is the only one discussed in the opinion, and on that ground the decision rested.* * * *
>
> "But, after the services have been ren-

> dered under a law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note."

In Louisville and Nashville R. R. Co. vs. Palmes, 109 U. S., 244, 256, it was said:

> " The question we have to consider and decide is whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. *In reaching a conclusion on that point, we decide for ourselves, indepen-*

dently of the decision of the State Court, whether there is a contract, and whether its obligation is impaired; and, if the decision of the question as to the existence of the alleged contract requires a construction of State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well-settled doctrine of this Court."

In State Bank of Ohio vs. Knoop, 16 How., 369, 391, it was said:

"The rule observed by this Court, to follow the construction of the statute of the State by its Supreme Court, is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. *We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and, if their construction of the contract in question impairs its obligation, we are required to reverse their judgment.* To follow the construction of a State Court in such a case would be to surrender one of the

most important provisions in the Federal Constitution."

Perhaps the case most often quoted upon this subject is The Jefferson Branch Bank vs. Skelly, 1 Black, 436, where it was said, at page 443 :

> " We answer to this, as this Court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been that the construction given by the courts of the States to State legislation and to State constitutions have been conclusive upon this Court, *with a. single exception*, and that is when it has been called upon to interpret the contracts of States, ' though they have been made in the forms of law ' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a Court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself

aggrieved by some particular State legislation if this Court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this Court should or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case it makes no difference in the obligation of this Court, in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State by its authority."

One of the last expressions of this principle by the Court is to be found in the case of McCullough vs. Virginia, 172 U. S., 102. This is one of the many cases arising under the coupon legislation of Virginia. It was decided by the State Court that the coupon provision of the Act of

most important provisions in the Federal Constitution."

Perhaps the case most often quoted upon this subject is The Jefferson Branch Bank vs. Skelly, 1 Black, 436, where it was said, at page 443 :

> " We answer to this, as this Court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been that the construction given by the courts of the States to State legislation and to State constitutions have been conclusive upon this Court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, ' though they have been made in the forms of law ' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a Court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself

aggrieved by some particular State legislation if this Court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this Court should or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case it makes no difference in the obligation of this Court, in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State by its authority."

One of the last expressions of this principle by the Court is to be found in the case of McCullough vs. Virginia, 172 U. S., 102. This is one of the many cases arising under the coupon legislation of Virginia. It was decided by the State Court that the coupon provision of the Act of

1871 was void, and it was claimed that this Conrt had no jurisdiction of the case for the reason that the State Court did not consider in its opinion the subsequent legislation of the State alleged to have been passed with a view of impairing the obligation arising under the Act of 1871, but limited itself entirely to the consideration of that act which it adjudged to be void. The jurisdiction of this Court was sustained, and the judgment of the State Court was reversed. As appears by the syllabus of the case it was expressly decided :

> (2) " That this Court has the right to inquire and judge for itself with regard to the making of the alleged contract with the holder of the coupons without regard to the views or decisions of the State Court in relation thereto." * * *
>
> (4) " That, while it is true that the State Court placed its decision on the ground that the Act of 1871 was void in so far as it related to the coupon contract, the judgment also gave the effect to subsequent statutes; and this Court has jurisdiction of the case."

In Water Power Co. vs. Street Railway Co., 172 U. S., 475, 487, Mr. Justice BROWN, who delivered the opinion of the Court, said that :

> " This Court has so frequently decided, notably in the very recent case of McCullough vs. Virginia, 172 U. S., 102, that it is the duty of this Court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question."

To the same effect see:

Delmas vs. Insurance Company, 14 Wall., 661, 668.
Wright vs. Nagle, 101 U. S., 791, 793.
N. O. Waterworks vs. La. Sugar Co., 125 U. S., 18, 38.
Mobile & Ohio Railroad vs. Tennessee, 153 U. S., 486, 492.
Shelby County vs. Union, &c., Bank, 161 U. S., 149, 151.
Chicago, etc., Rd. vs. Nebraska, 170 U. S., 57, 68.

It would, therefore, seem clear that this Court is not precluded from taking jurisdiction of the present case, because the State Court placed its decision upon the ground that there was no contract between the State of Texas and the railroad companies under the Acts of the Legislature of 1861, 1863 and 1864, by reason of the unconstitutionality of the treasury warrants in which the payment by the railroad companies

was made, inasmuch as by such construction of the contract the Act of August 13, 1870, remains valid under the Constitution of the United States, and the validity of such action was drawn in question, and the decision of the State Court was in favor of its validity within the meaning of Section 709 of the United States Revised Statutes (Bridge Proprietors vs. Hoboken Co., *supra*).

THIRD POINT.

The contract between the State of Texas and the railroad companies as it appears upon the record was valid. The State failed to sustain by proof its attack upon the same, and the grounds upon which the Court of Civil Appeals held the same invalid are untenable.

I.

THE TRUE CONTRACT BETWEEN THE STATE OF TEXAS AND THE RAILROAD COMPANIES AS IT APPEARS UPON THE RECORD.

In accordance with the doctrine to which we have heretofore referred, it is necessary to now examine the case *de novo* and ascertain whether in the judgment of this Court there was, in fact,

a valid contract between the State of Texas and the railroad companies.

The facts as to the existence of the contract are few and uncontroverted. It is undisputed that the Acts of 1861, 1863 and 1864 were passed by a duly-constituted Legislature, and that in themselves they are free from any charge of invalidity and unconstitutionality.

These acts simply constitute an offer upon the part of the State of Texas to allow the railroads to set off at par whatever State treasury warrants they may hold against their indebtedness to the State on account of the school-fund loans, provided the railroad companies will receive State treasury warrants at par for freight or passage at the prices or rates established by law.

The offer made by the State was accepted by the Washington County Railroad Company and the Houston and Texas Central Railway Company, and all the requirements contained in said acts to be performed by the railroad companies were performed by them. Copies of the acts in question were posted in the cars of their lines of road and in their railroad stations, and the State treasury warrants were received by the railroad

companies at par for freight and passage upon their lines.

Upon an accumulation from time to time of the State warrants received by them, the railroad companies paid and delivered them to the Comptroller of the State of Texas on account of the interest due upon the school fund loans, and credit was given to said railroad companies upon the books of the State for the amount of such payments.

This closed the transaction arising upon the offer of the State contained in the Acts of 1861, 1863 and 1864, and resulted in a completed and executed contract, the obligation of which on the part of each of the parties thereto was not to deprive the other of the rights and interests which had vested thereunder.

II.

THE ACTS OF 1861, 1863 AND 1864, WHICH CONTAINED THE OFFER WHICH WAS ACCEPTED BY THE RAILROAD COMPANIES ARE OF INDISPUTABLE VALIDITY.

While its opinion upon the point is not at all clear, yet we do not understand that the Court of Civil Appeals meant to include the Acts of Feb-

ruary 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, in its somewhat wholesale attack upon the legislation of the war period (Record, p. 214). There is certainly nothing in the terms of the acts themselves inconsistent with the Constitution, and this being so, and the acts being complete in themselves, the Courts have, we submit, no right to speculate about almost forgotten facts for grounds upon which to annul the legislation.

When legislative acts are challenged as unconstitutional, they are always upheld unless manifestly in violation of the Constitution, and the Supreme Court of Texas has often applied this rule (*Gunter vs. Texas Land and Mortgage Company, 82 Tex., 496, 503; Barker vs. Torrey, 69 Tex., 7, 12; Wright vs. Adams, 45 Tex., 134; Orr vs. Rhine, 45 Tex., 345, 354; Sutherland vs. De Leon, 1 Tex., 250, 304*). In approaching the consideration of these acts, therefore, they must be regarded as valid, and every reasonable presumption must be indulged in their favor. This is especially true, as against an attack, upon the ground that they were enacted from improper and unlawful motives prompting the Legislature, and to accomplish an

illegal design. They should be read in the light of the Constitution and judged accordingly, without regard to controverted facts, obscured by lapse of time. We submit that *where a statute is clearly within the constitutional power of the Legislature, and is free upon its face from any apparent vice, the Courts cannot seek in the motives and objects of the Legislature for grounds upon which to annul it.* Acts which are within the constitutional power of the Legislature, and are not by their terms contrary to the paramount authority of the National Government, are, it seems to us, necessarily beyond the reach of the Courts, and any inquiry into the motives and objects of the Legislature, not apparent upon the face of the acts, for ground on which to annul them, is unwarranted. We submit, therefore, that Courts cannot properly look beyond the acts in question and test their validity by inquiring into the motives and objects that may have prompted the Legislature to pass them.

The attention of the people was distracted by the war then raging, and, while the chief incidents of the struggle are remembered and have taken their place in history, the objects and purposes of legislation enacted in those

days, further than as disclosed by the legislation itself, are at this late day unknown, and can be divined only by the merest speculation. It may be true that these acts were made necessary by the war, but the difference between acts passed to *promote* the rebellion and those *on account* of the rebellion—between those whose object was to *assist in carrying on the war* and those *occasioned* by the war—is too obvious to require demonstration. The State had engaged in a desperate struggle. Its resources were well nigh exhausted by the war. Its treasury was empty, and the sources of revenue were exhausted. Specie was unknown, and treasury warrants drawn by the Comptroller to meet appropriations made by the Legislature for the support of the State Government, as well as for other purposes, could not be collected. The State was without the means wherewith to pay the salaries of its officers and of the agents necessary in conducting the government, or for protecting society, guarding the safety of its inhabitants, and performing the only functions for which government exists. By the acts in question some opportunity was afforded to the holders of the obligations of the State, having occasion to use the railroads, to

get par for their warrants, which in turn the State could take up by canceling to the same extent indebtedness due it. Thus the State was able to utilize its assets in satisfying its own obligations incurred in conducting the government. Who can say that this did not enable the State to keep up the civil government and preserve social order? Who can say that these acts were not deemed by the Legislature absolutely essential to that very purpose? Certainly there is nothing upon the face of the acts inconsistent with such object; but, on the contrary, they were well calculated to accomplish it. Must not the Courts attribute to the Legislature this lawful and worthy object in enacting these laws, instead of an illegal purpose?

There is certainly nothing in these acts to indicate that they contemplated the use of any but legal warrants, or any except warrants issued in the ordinary way to pay appropriations duly made for the support of the government.

The collection of the debt due by the railroads in specie had been rendered impossible by the action of the State in engaging in the war which drove all lawful money out. Being unable therefore to collect the indebtedness due it, and use

the money thus collected as it might have done in paying the warrants drawn in favor of its own creditors, the State, by these acts, in effect, drew upon its debtors in favor of its creditors, which was obviously the only available means at the time of utilizing its assets in paying its liabilities. This not only did not contemplate a "circulation" of the warrants, but was a means for taking up and canceling them, thus preventing the circulation which was otherwise inevitable, since the State was without cash or other means of paying them. Instead of *aiding* the circulation of the warrants, as held by the Court of Civil Appeals, these acts were designed to *restrict* and were among the few means of *restricting and preventing* their circulation.

So our contention is that these laws which authorized the payments in question constitute an independent piece of legislation, complete in itself, which must stand or fall on its own merits; that they are not so connected with other laws relating to the State's finances as to be affected necessarily by any violation of the Constitution of which those other laws may be guilty. Judged by their own provisions, and considering the immediate subject matter, the acts violate no

by themselves. It is not at all impossible, or even difficult, to believe that the Legislature did pass, or would have passed, those laws without any reference to the alleged unconstitutional legislation. Indeed, there is evidence of this in the Act of February 9, 1861. We submit that the validity of the laws in question must be sustained, whatever view may be taken of the general financial policy and laws of the State of Texas during the war.

Certainly the Act of February 9, 1861, is not subject to the objection urged against the others, and we can conceive of no ground on which it can be avoided, as the war had not begun at that time.

While that act only authorized the sinking fund to be paid in treasury warrants, yet it is evidence of the policy of the State at that early day, with which the subsequent acts were in harmony. It shows the disposition of the State to accept treasury warrants in payment of the indebtedness in question, and this too at a time when there is no room for the charge that such policy was adopted to aid the circulation of warrants. We beg to emphasize the importance of this act, not only as authority for the payments,

provision of the State Constitution, and are such laws as the Legislature was then perfectly competent to pass. An unconstitutional provision in a law does not invalidate even other provisions of the same statute, unless the valid and invalid provisions are so connected and interdependent that they cannot be separated, and, hence, it must be presumed that the Legislature would not have enacted the valid provisions if the invalid portions were stricken out. *A fortiori*, is it true that an unconstitutional law cannot invalidate another law, passed at a different time, unless the two laws are clearly, directly and necessarily connected and interdependent, so that one cannot stand without the other. It is not sufficient that a connection is possible or probable or may be inferred. Now, can it be truly said, in any proper sense of the words, that there is a direct, certain, necessary connection and interdependence between these acts and the laws, the sins of which the State seeks to visit upon them? On the contrary, the alleged connection, if any, is indirect and uncertain—and a by no means necessary inference from the history of the times. The acts are complete in themselves, stand by themselves, and must be judged

but also as an aid to the construction of the others, and as evidence, practically conclusive, that the later acts authorizing the payments in warrants were but in pursuance of a lawful policy of the State.

III.

THE EXISTENCE OF THE CONTRACT BETWEEN THE STATE AND THE RAILROAD COMPANIES, BEING LAWFUL UPON ITS FACE AND BEING CLEARLY ESTABLISHED, IT DEVOLVED UPON THE STATE TO PROVE THE FACTS RELIED UPON TO SHOW ITS ILLEGALITY.

As we have seen, the original petition of the State shows that it does not declare simply upon the bonds of the railroad company, nor upon the legislative contract embodied in the Act of 1856, authorizing the investment of the Special School Fund in railroad bonds. It declares upon the bond contract and the legislative contract of 1856, *but as modified by* the Act of August 13, 1870. The petition sets out the provisions of the Act of 1870, and avers that they were accepted by defendant. The act provides that the railroad company might avoid the sale of its railroad for indebtedness to the State for loans from the Special School Fund, and for the

non-payment of principal and interest, by the payment into the treasury of the State, on November 1, 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on May 1, 1870, and by the payment, in addition, on November 1, of one per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest, and one per cent. on account of said sinking fund semi-annually thereafter.

The meaning of this provision is manifest. The state of war and the period of reconstruction which followed it having interfered with the regularity of payments on account of the Special School Fund loans, the State deemed it necessary to make a fresh start and to arrange for regularity of payments in the future and for the gradual extinction of the debt. To this end, a new starting point had to be provided, and the State determined to take the status of the account of each railroad company as it stood on May 1, 1870, as the new starting point and basis for future payments. Hence, arose a modification

of the original contract, evidenced by the bonds and Act of 1856. In virtue of such modification the railroad companies agreed to discharge the loans evidenced by the bonds, and the State agreed to allow such loans to be discharged, by the payment of the aggregate amount of indebtedness as the matter stood on May 1, 1870, payments to be made semi-annually, at the rate of six per cent. per annum interest, and one per cent. semi-annually as a contribution to the sinking fund.

It is clear from the petition of the State that it has brought this suit in affirmance, not in disaffirmance, of this modification of the original contract. It, therefore, became necessary for it both to allege and to prove what were the aggregate amounts of the indebtedness as the accounts stood on May 1, 1870. The object of the suit being to recover, not the amount of the bonds, but the balance left of the aggregate indebtedness as the account stood on May 1, 1870, after crediting defendant with the payments admitted in the petition to have been made since that date, the all-important fact is what was the status of the accounts on May 1, 1870. Assuming the burden of pleading, as

needs she must, the State alleged that the aggregate indebtedness, as the matter stood on May 1, 1870, was $657,324.35 in the case of H. & T. C. Ry. Co., and $103,840.01 in the case of the Washington County Railroad Co.

In its answer defendant takes issue with the State as to the amount of the indebtedness at the new starting point fixed by the legislation of 1870. It is denied that the amount due by the old H. & T. C. Ry. Co. was $657,324.35, and it is averred that it was $551,550; and in the case of the Washington County Railroad Company it is denied that the amount was $103,840.01, and it is averred that it was $49,800. The averments of the answer which precede and follow the issues made as to the status of the indebtedness on May 1, 1870, explain and show the controlling importance of that issue. They give a history of the creation and administration of the Special School Fund by the Legislature so far as it bears upon the present case, including a statement of the payments made before, during and since the war. They show that the debts have been completely extinguished by the payments which the State, in her petition, admits to have been made since

1870, unless the State is able to establish that the amounts due, as the accounts stood on May 1, 1870, were as alleged in her petition. There is nothing in the answer to relieve the State of the burden of proving the status of the accounts as they stood on May 1, 1870; without such proof the balance, if any, due by the defendant cannot be determined.

It follows from the foregoing that the ultimate fact to be determined in this case was what was the aggregate amount of the indebtedness of each company as matters stood on May 1, 1870. All the questions and issues lead up to this fact. There is no dispute as to the amounts paid since May 1, 1870. We may go further, and say that there is no dispute, or rather no room for dispute, as to the aggregate amount of the indebtedness as the accounts stood on the books of the State May 1, 1870. The only evidence in the record of such indebtedness, as it stood on May 1, 1870, were certified transcripts from the books of the Comptroller's department, and those transcripts showed that the aggregate amount of the indebtedness, "as said aggregate amount stood on the "1st day of May, 1870," of the H. & T. C. R. Co. and of the Washington County Railroad Co., was

$551,550 and $49,800 respectively, instead of $657,324.35 and $103,840.01, as alleged by the State. The sole matter thus left in dispute was the correctness of the accounts. The State charged that certain credit entries on the accounts were illegal and null, and that the defendants should be recharged with the amounts thus credited.

The object of the foregoing discussion is to show that this is not an ordinary suit to recover a loan, evidenced by notes or bonds, where it suffices for plaintiff to introduce in evidence the notes or bonds, and where it devolves upon the defendant to prove any payment pleaded.

But to meet every possible view let us consider the petition as a declaration upon the bonds executed for the money loaned, as well as upon the basis fixed by the act referred to. We find, in either aspect of the matter, that defendant, in answer to the State's petition, pleaded (Record, p. 23), in detail, various payments upon said indebtedness sufficient in the aggregate to extinguish the same, as is conceded on all sides, provided all such payments were valid. Among the payments thus pleaded were those made in State treasury warrants. As authority

for making the payments in warrants, the answer set forth the acts of February 9, 1861, of December 16, 1863, and May 28 and November 15, 1864, whereby the railroad companies were authorized to tender, and the Comptroller was required to receive, treasury warrants in payment of such indebtedness. That these pleas were good will not, we apprehend, be seriously questioned. To avoid them, the State, by supplemental petition, set up the alleged illegality in the warrants, and in the acts authorizing their payment.

Thus, the issue was joined—the plaintiff alleging an indebtedness, and the defendant pleading payments chiefly in money, and the balance in treasury warrants, and referring to laws authorizing the payments in warrants, and the plaintiff, in reply, seeking to avoid the payments in warrants by alleging facts to show that they were illegal and unauthorized.

Under the issues thus made, it undoubtedly devolved upon the plaintiff to prove the indebtedness alleged. She proved the amount of the *original loan*, and the execution of the bonds described in the petition by the admission of the defendant.

The defendant, to sustain its plea of payment,

introduced transcripts from the books of the Comptroller's Office (Record, pp. 115–134), duly authenticated and certified to by the Comptroller under his seal of office, as provided by statute, showing all payments made on said indebtedness down to May 1, 1870, and the standing of the account on that date; and also introduced the certificate of the Comptroller, showing the payments made subsequent to May 1, 1870 (Record, pp. 132–134). This evidence fully sustained defendant's pleas of payment, and showed the satisfaction of the indebtedness described in plaintiff's petition. It showed that the payments in warrants were made to and accepted by the Comptroller as pleaded in the answer. It did not show the date or denomination of the warrants, or the purposes for which they were issued, but it did show that they were received by the Comptroller apparently without question, and that he gave credit upon the books of the State therefor as authorized and required by the acts of the Legislature above referred to. It appearing, therefore, that the payments were made in warrants of a character which the Comptroller—the officer charged by law with that duty—received, and for which he gave credit upon the

books of the State, it would seem to follow inevitably that the defendant had discharged fully its burden of proof. It then devolved upon the State to show, if it could, that the warrants were not of a character which the Comptroller was authorized to receive. The acts authorizing the payments did not specify any particular series or kind of warrants. But suppose it were otherwise—suppose the statute had authorized the payment to be made in warrants of a certain date, and of a certain denomination, and of a certain series, and required the Comptroller to receive them in payment, and the proof should show that payments were made in warrants without indicating their character, but which the Comptroller received and allowed as payments, and credited upon his books—could it possibly be held in such a case that such proof did not show, at least *prima facie*, valid payments, and satisfy the burden of proof resting upon the defendant? Upon what principle could it be contended that the defendant should do more than show that the payments were made in warrants, which the Comptroller accepted and allowed as valid payment? Would it not be presumed, upon familiar principles, that the officer accepted

only the warrants which he was authorized by law to accept? Such presumption is peculiarly applicable here, because there is not only the presumption that the officer of the State performed his duty, and received only warrants which he was authorized by law to receive, but there is the further presumption that the officer would not receive, and the railroad companies would not pay, illegal warrants; or, in other words, it is presumed that they did not engage in a transaction positively illegal.

It is argued that, because there was supposed to be in existence, at the time these payments were made, treasury warrants issued for illegal purposes, it devolved upon the defendant, not only to prove the payments, but to go further and prove that no illegal warrants were included, or, in other words, that the defendant should not only prove its own case, but should, by evidence, negative the existence of a fact which, if admissible at all, could be so only in behalf of the plaintiff for the purpose of avoiding the case made by the defendant. It could be contended, we submit, with just as much reason, that it devolved upon the defendant to show that the money used in making the payments shown to have been made in money was not counterfeit.

It is familiar law that, when a statute has confided to any public officer the power and duty to determine questions of fact arising in the course of his duties, the findings made by him are conclusive. The only question which can arise between an individual, claiming rights based on the decision or acts of the public officer, and the public or any person denying the validity thereof, are fraud and collusion, or absolute want of power in the officer to act in the premises. As the Acts of 1861, 1863 and 1864 authorize payments in treasury warrants, and impose upon the Comptroller the power and duty to ascertain compliance with the conditions imposed by law, and to receive only regular, valid warrants of the State, it follows that, on proof of the delivery, by the defendants, of treasury warrants under the legislation of 1861, 1863 and 1864, and the acceptance thereof by the Comptroller, a presumption arises as to the existence of all the facts necessary to the validity of the transaction, which can be rebutted only by the State's proving either that there were no valid treasury warrants in existence at the time, or that the particular warrants used were invalid.

But the State contends that the presumptions

which usually exist in favor of the regularity and validity of official acts do not exist in the present case, because the State and all or a large majority of its inhabitants were in sympathy with the war and actively engaged in promoting it, and, hence, it is not to be presumed that the Comptroller or Treasurer entertained different opinions, or would act counter to the known sentiments of the State and the people, whose public servants they were. This position is utterly inconsistent with that assumed by the State when it attempts to meet the defense that it could not get relief from the consequences of its own wrongful act. Then it denied for itself and the people of Texas any part or responsibility for the acts of its officers; now, it claims that these same officers, in respect to the same acts, were so directly and completely controlled by the mandates and sentiments of the people of the State that there cannot be attributed to them the independent judgment and discretion which such public officers are generally presumed to exercise. But, giving to this contention of the State its greatest effect, we simply reach the point that there is no reason for supposing that the Comptroller would have refused warrants

issued to circulate as money, if any such had been tendered, and we are as far off as ever from any positive proof as to the character of the particular warrants actually used.

This contention and the judgment of the Court below in effect fully sustaining it is directly opposed to the law as long since settled and recently reaffirmed by judgments of this court (*Thorington vs. Smith*, *8 Wall.*, *1*, *12*; *Horne vs. Lockhart*, *17 Wall.*, *570*, *580*; *Sprott vs. United States*, *20 Wall.*, *459*, *464*; *Williams vs. Bruffy*, *96 U. S.*, *176*, *192*; *Johnson vs. West India Transit Co.*, *156 U. S.. 618*, *645*; *Baldy vs. Hunter*, *171 U. S.*, *388*).

In *Johnson vs. West India Co.* (156 U. S., 645) this Court said:

> "This contention is disposed of by referring to the well-settled doctrine, affirmed in repeated decisions of this court, that "the acts of the several States, in their individual capacities and of their different departments of government—executive, judicial and legislative—during the war, so far as they did not impair, or tend to impair, the supremacy of the National authority or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and

> war did not loosen the bonds of society or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects when they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of the citizens under the Constitution."

It would seem to follow that one attacking an act done during the war has the burden of showing that it did "impair, or tend to impair, the supremacy of the National authority or the just rights of citizens under the Constitution." Furthermore, he must not only prove that such was the *effect*, but, under the decisions of this Court, he must go further and prove that such was the "*actual intent*." In *Thorington vs. Smith* this Court, in speaking of transactions in Confederate notes, said (8 Wall., 1, 12):

> "They are transactions in the ordinary course of civil society, and though they

> may indirectly and remotely promote the ends of the unlawful government are without blame except when *proved* to have been entered into with *actual intent* to further invasion or insurrection."

The necessity of proof of the "actual intent" to further invasion or insurrection was recently emphasized by this Court in Baldy vs. Hunter, 171 U. S., 388, 395.

In ordinary cases this Court has often recognized the rule that he who holds the affirmative must prove it. As the Court said, in United States vs. Linn, 1 How., 104, 111, "the general rule is that he who holds the affirmative must prove it;" and, unless the rule is to be disregarded in this case, it would seem that the burden of proving the kind and character of the warrants in question fell upon the State, which affirmatively alleged that they were invalid for certain reasons. Whether they were invalid for the reasons alleged could only be proved by showing what was their nature and description.

In United States vs. Howland, 4 Wheat., 108, it appeared that the United States claimed priority over other creditors of an insolvent in the case of an assignment which did not purport to con-

vey all the debtor's property. By the Act of 1799 the United States was not entitled to such priority unless the debtor had made an assignment of all his property. It was held that the burden of proof was upon the United States to show that the assignment was in fact an assignment of all the debtor's property. At page 116 it was said by Chief-Justice MARSHALL that :

> " The deed then conveys only the property contained in the schedule, and the schedule does not purport to contain all the property of the parties who made it. In such a case the presumption must be that there is property not contained in the deed unless the contrary appears. The *onus probandi* is thrown on the United States. * * * The depositions do not aid the deed. The question whether the whole property is assigned is still left to conjecture; and this being the fact on which the preference of the United States is founded ought to be proved. Not being proved, the Court is of opinion that this is not a case in which it can be claimed."

In Moore vs. Greene, 19 How., 69, 72, it was said :

> " The burden of proof falls upon him who attempts to disturb a possession of ages, transmitted and enjoyed under the forms of law."

In Clements vs. Macheboeuf, 92 U. S., 418, it was held that where a party alleges that a deed executed by his attorney, under a power to convey, is invalid for matters not apparent on its face, the burden of proving them is on such party, and the Court said at page 425 :

> " Charges of bad faith are easily made ; but they are of no avail to the party making the same, unless he introduces competent evidence to support the accusation."

In Prevost vs. Gratz, 6 Wheat., 481, it was held by Mr. Justice STORY that,

> " to establish the existence of a trust, the *onus probandi* lies on the party who alleges it."

The rule, therefore, applicable to this case, would seem to be that the burden of proving that the treasury warrants in question were null and void for the reasons stated fell upon the State of Texas which so alleged, and that the railroads were not required to show that the warrants were valid. Especially is this so in view of the fact that the presumption is that acts of a State done by its officers are constitutional and valid, and the presumption in the

present case is that the warrants were issued under a constitutional law, and that the act of the Comptroller and Treasurer of the State of Texas in receiving such warrants and giving the railroads credit therefor was perfectly proper and legitimate and in accord with the Constitution and laws of Texas.

IV.

THE STATE FAILED TO PROVE AND THE RECORD CONTAINS NO EVIDENCE SHOWING THE CHARACTER, DATE OR DENOMINATION OF THE WARRANTS SURRENDERED TO THE STATE BY THE RAILROAD COMPANIES IN MAKING THE PAYMENTS IN QUESTION.

The evidence wholly fails to show when or for what purpose the warrants used in making the payments in question were issued, or the character of the warrants in any respect—whether they were issued before or during the war, and, if during the war, whether for civil or military services, and there is nothing to indicate in any way their form or denomination. The transcript from the books of the Comptroller's Office, introduced in evidence, showed the payments as pleaded, and that they were in treasury warrants acceptable to, and which were, in fact,

accepted by, the Comptroller, who was the officer designated by law to receive them, and that credit for such payments was duly given at the time upon the books of the State.

The District Judge, himself, found that it had not been proved whether the warrants actually used in making the payments were warrants issued for State indebtedness incurred after the war began, or, if the latter class, whether they were warrants issued for military purposes or for civil indebtedness, etc. (Third Finding of Fact, Record, p. 71).

There is absolutely no conflict in the evidence upon this or any other point in the case. While the statement of facts occupies a large part of the record, it consists chiefly of documents, etc. That there were abundant warrants issued to pay appropriations for the support of the State government and for other lawful purposes available for use in making these payments is a fact admitting of no dispute.

Large appropriations were made just before the commencement of the war, and during the war, for the ordinary expenses of the civil government of the State, which the State was without means to pay. The Legislature which convened

on November 7, 1859, and adjourned February 13, 1860, appropriated for the support of the State Government during the years 1860 and 1861, and for other lawful purposes, $1,169,082.08 (Gen. Laws First Reg. Ses. 8th Leg., pp. 1, 9, 11, 18, 20, 21, 30, 35, 36, 37, 38, 59, 79, 86, 102, 112 and 119). The extra session of the Eighth Legislature, which convened January 21, 1861, and adjourned April 9, 1861, appropriated for lawful purposes, including the defense of the frontier for the year 1860, and to meet deficiencies in former appropriations, $311,594.50 (Gen. Laws, Extra Ses. 8th Leg., pp. 1, 8, 17, 32, 44 and 53). The first regular session of the Ninth Legislature, which convened November 4, 1861, and adjourned January 14, 1862, made appropriations for the support of the civil government and for other lawful purposes, aggregating $693,252.90 (Gen. Laws, First Reg. Session 9th Leg., pp. 3, 7, 31, 44, 47, 55, 56). The first extra session of the Ninth Legislature, which convened February 2, 1863, and adjourned March 6, 1863, made appropriations for lawful purposes aggregating $293,295.60 (Gen. Laws, Ex. Ses. 9th Leg., pp. 7, 11, 28 and 31). It is an historical fact that the treasury of the State

was practically empty at the beginning of the war, and that the revenues of the State were totally inadequate to meet the ordinary expenses of the civil government of the State during the war, and, indeed, were practically suspended for that period. Governor Houston convened the Legislature in special session on January 21, 1861, because of the condition of the State's finances, and to provide for the large indebtedness of the State, especially that incurred for defense of the frontier against Indians.

It is to be observed that the Court of Civil Appeals does not find that the warrants were drawn otherwise than to pay appropriations made by the Legislature for lawful purposes, and, indeed, there is no evidence whatever showing that they were drawn for any other purpose than the payment of appropriations duly made by the Legislature for lawful purposes.

It seems hardly possible that the questions which were so seriously discussed in the opinion of the Court below, and the reasons there advanced to show the unconstitutionality and general invalidity of these warrants, were all considered and given without any knowledge of or proof as to the character of the warrants about which

the Court was speaking. It is almost inconceivable that a Court should deliberately and solemnly declare that a treasury warrant was invalid for certain specified reasons without ever having seen such warrant, and without any proof that such warrant fell within the conditions from which the Court reached its conclusions. Such, however, is the case here, for the record is absolutely barren of proof as to the character or date of a single treasury warrant paid to the State of Texas by the railroads under the Acts of 1861, 1863 and 1864.

The State's witness, McCall, testified at page 179 of the record as follows:

> "The plaintiff next introduced W. C. McCall as a witness, who, after being duly sworn, testified in effect that he was employed in the Comptroller's department and had been so employed about eighteen months, and that he had been, at the instance of the Attorney-General, assigned by the Comptroller, together with G. A. Proctor, to the duty of searching for evidence of the character of the warrants in which the payments in question were made; that he had been unable to find any data or memoranda of any kind showing the kind or character of warrants used in making such payments; that there was a large number

of old warrants, purporting to have been issued during the war, in the basement of the Comptroller's Office, without any endorsement or writing on them to indicate, and he was unable to find any data or memoranda to indicate by whom or for what purpose or on what account such warrants were received or from whom they were received; that he had not examined all the warrants in the basement, but, at the request of the Attorney-General, representing the plaintiff in this case, had taken from the lot a number, which he then produced and identified as those taken by him from the basement of the Comptroller's Office shortly before the trial."

Another witness for the State, G. A. Proctor, testified as follows at page 182 of the record:

"The said witness further testified that he, with W. C. McCall, had been, at the instance of the Attorney-General, assigned by the Comptroller to the duty of searching for evidence of the character of the warrants in which the payments in question were made; that he had been unable to find any data and memoranda of any kind showing the kind or character of warrants in making such payments; that there were a large number of old warrants purporting to have been issued during the war in the basement of the Comptroller's Office without any endorsements or writing on them to indicate by

whom or for what purpose or on what account such warrants were received, or from whom they were received."

R. S. Lovett, the attorney for the plaintiffs in error, took the stand as a witness for defendant, and his testimony at page 185 of the record is as follows:

"The witness testified that he had been specially charged by his associates with the preparation of this case for trial; that he had called upon the Treasurer and Comptroller of the State of Texas for information respecting the character, date and denomination of warrants used in making the payments in controversy, and asked for copies of any records of their respective departments giving such information, but that he was informed by said Comptroller and Treasurer that they were without such information, and that it was not disclosed by any records of their departments; that he made diligent effort to find some official or employee of defendant or person having knowledge of the kind and character of warrants used in making such payments, but that he had been able to find no such person, and no such person who was connected with defendant at the time such payments were made."

The railroad also examined its auditor, George Kidd, who said at page 185 of the record:

"That he was auditor of the Houston and Texas Central Railroad Company, the defendant, and as such had charge of its books and papers, and was familiar with them; that he had made diligent search of the books and the records of defendant company to ascertain whether there was anything therein to show the date, character or denomination of the warrants used in making the payments in question, and that he had found nothing whatever in reference thereto.

"On cross-examination he testified that the books showed the fact, dates and amount of payments in warrants, but not the kind, character or denomination of the warrants."

The defendant also offered in evidence the deposition of E. W. Cave, who was examined as a witness by the State, but the State only offered in evidence a small part of his testimony. Cave testified as follows at pages 178 and 187 of the record:

"As I have said in my answer to previous interrogatories, I am without knowledge of the kind or character of warrants used by the Houston and Texas Central Railway Company in making the payments referred to" (Rec., p. 178).

"I have no knowledge as to the kinds of warrants used by the Houston and Texas Central Railway Company in making the

payments in question. I had no connection with that company at that time, or with the treasury department of the State of Texas" (Rec., p. 187).

The foregoing is substantially the entire evidence in the record upon the question, and the sum and substance of it all is that there is no evidence whatever in this case as to the kind and character of the warrants paid by the railroads on account of the school-fund loans to them.

Not only does no witness pretend to say that any of the warrants, which have been injected into this case against the objection of defendant, were a part of the warrants surrendered to the State by the railroads, but nobody even undertakes to say that the warrants put in evidence and printed in this record were of the same kind, character and description as the warrants surrendered to the State by the railroads under the Acts of 1861, 1863 and 1864.

The admission in evidence of the warrants produced by the witnesses for plaintiff was, of course, strenuously opposed by the defendant, but all objections were overruled (Rec., p. 92), and the warrants were introduced in evidence. Remembering that no one testified that the

warrants so let into the case were of the same kind, character, denomination and description and of the same date as the warrants surrendered in pursuance of the Acts of 1861, 1863 and 1864, let us see what the Court below proceeded to hold:

It was seriously stated by the Court of Civil Appeals that the warrants must have been issued in violation of the State Constitution for the purpose of circulating as money, because during the war acts of the Legislature were enacted which enabled warrants of small denominations to be issued, but whether the denomination of the warrants actually surrendered in this case was large or small is unknown, and it is also unknown and a mere matter of speculation as to whether the warrants in question were issued before or during the time of the war.

We have, therefore, the rather novel and curious situation of a Court having declared certain treasury warrants to be absolutely void for certain specified reasons, without knowing at all whether the facts in regard to such warrants brought them within the reasons from which its conclusions were drawn.

If, as we think we have shown, it is within the

province of this Court to inquire whether or not there was a contract between the railroads and the State of Texas, arising under the Laws of 1861, 1863 and 1864, of course such inquiry is confined to the record in this case. This record shows a *prima facie* case of a contract arising from the offer of the State contained in said acts and a compliance with the terms thereof by the railroads, but is entirely devoid of any evidence tending to show the nature of the warrants in question, the date of their issue, or any other fact from which it would be possible to determine whether such warrants were null and void on the ground of unconstitutionality or for any other cause. It would seem, therefore, that when this Court comes to examine this record for the purpose of determining whether there was a contract between the State of Texas and the railroads it will be confined to the evidence therein contained, which consists simply of the offer contained in the Acts of 1861, 1863 and 1864, the acceptance thereof, and the performance thereunder by the railroads and the acceptance by the State of such performance as a complete performance under the offer. This would seem to make out a *prima facie* case of contract, and there

is absolutely no evidence in the record showing or tending to show that the whole transaction was void by reason of the character of the warrants surrendered to the State, inasmuch as there is no evidence anywhere in the case to show what the character of such warrants was. For all that appears by the record the warrants surrendered by the railroads to the State of Texas were all issued prior to the war and were of a large denomination, and there is nothing to show but that each one of the warrants so surrendered to the State was issued in payment of the civil expenses of the State.

In the absence of any proof in this record as to the date, denomination or character of the treasury warrants, it is not plain how this Court, on an examination of the question of the existence of the contract in this case, can say that there was no contract and that the whole transaction between the State and the railroads was void and to be set aside because of the character of such treasury warrants, as was done by the Court below.

In Keith vs. Clark, 97 U. S., 454, it appeared that plaintiff tendered to the defendant, who was a collector of taxes, $40 in bills of the

Bank of Tennessee. The offer of the plaintiff was based upon a section of the charter of the bank enacted in 1838 that the bills of the said bank should be receivable by all tax collectors in all payments for taxes due the State. The defendant declined to receive the $40 of bills of the Bank of Tennessee, and the plaintiff paid the amount in lawful money under protest and brought suit to recover the same.

Upon the trial it was proved that the bills were issued subsequently to May 6, 1861, and were worth about 25 cents on the dollar. The Court charged the jury that if the notes tendered were issued subsequently to May 6, 1861, and during the existence of the State Government established at that date in hostility to the Government of the United States, the defendant was not bound to receive them. The theory of the trial Court apparently was that the contract arising from the charter of the bank was within the protection of the Constitution except as to notes issued during the time of the war, and as to those notes the amendment to the State Constitution of 1865 which declared that all the notes of the bank issued after May 6, 1861, were null and void, was not unconstitutional as

impairing the obligation of the contract for the reason that such notes were issued in aid of the Rebellion.

The jury found a verdict for the defendant and the Supreme Court of the State affirmed the judgment rendered upon such verdict. The case was brought to this Court by writ of error, which took jurisdiction and determined first whether there was a contract and then whether it had been impaired. The judgment of the Court below was reversed, and, upon the question whether the notes had been issued in aid of the Rebellion and were therefore void, it was held that there was no evidence whatever in the record and the Court declined to pass upon the point. Mr. Justice MILLER, who delivered the opinion of the Court, said, at page 466, as follows:

> "We cannot infer, then, that these notes were issued in violation of any Federal authority.
>
> "On the other hand, if the fact be so, nothing can be easier than to plead it and prove it. Whenever such a plea is presented, we can, if it comes to us, pass intelligently on its validity. If issue is taken, the facts can be embodied in a bill of

exceptions or some other form, and we can say whether those facts render the contract void. *To undertake to assume the facts which are necessary to their invalidity on this record is to give to conjecture the place of proof and to rest a judgment of the utmost importance on the existence of facts not found in the record nor proved by any evidence of which this Court can take judicial notice.* We shall, when the matter is presented properly to us, be free to determine, on all the considerations applicable to the case, whether the notes that may be then in controversy are protected by the provision of the Constitution or not. And that is the only question of which, in a case like the present, we would have jurisdiction."

It is unnecessary to point out the somewhat extraordinary similarity between the Keith case and the case at bar. Both were brought to this Court upon the ground that a contract had been impaired by a subsequent law of the State.

In the former the question was whether the contract was void because certain bills were issued in aid of the Rebellion. The Court declined to pass upon it because the record was without evidence upon the question. In the case at bar the question presented is whether the contract is void because the treasury warrants were

in violation of the Constitution. As to this the record is absolutely without evidence, and applying the principle declared in the Keith case we submit that this Court in a case of this importance will not substitute conjecture for proof and will not rest its judgment upon facts not found in the record.

V.

IT IS NOT SHOWN BY THE RECORD NOR BY THE LEGISLATION REFERRED TO BY THE COURT OF CIVIL APPEALS, THAT THE WARRANTS SURRENDERED TO THE STATE BY THE RAILROAD COMPANIES IN MAKING THE PAYMENTS IN QUESTION WERE ISSUED TO CIRCULATE AS MONEY, OR WERE BILLS OF CREDIT EMITTED BY THE STATE.

There being nothing whatever in the evidence to show the date, denomination, character or form of the warrants used in making the payments in question, the Court of Civil Appeals resorted to the legislation of the war period for evidence of the facts which the State had wholly failed to prove, and finds a general indefinite governmental policy, supposed to be revealed by various acts passed during that period, involving the violation of the State Constitution, which prohibits the issuance of treasury warrants to circulate as money.

This governmental policy, the existence of which is evidenced solely by acts of the Legislature authorizing the issuance of treasury warrants, optionally in small denominations, to actual creditors of the State, and pursuant to specific appropriations, and making them receivable for taxes and other debts due the State, is supposed to have a blighting effect on all transactions or contracts involving the use of treasury warrants, and on all future laws on independent matters during the war, the operation of which would effect a payment or discharge of any indebtedness represented by treasury warrants.

We submit that this Court will not sanction this novel mode of invalidating laws and contracts.

The facts disclosed by the laws cited and by the history of the times are simply that the finances of the State of Texas during the war, like those of every other Southern State, were in a state of great disorder. Her treasury was empty. There was no specie or United States currency in circulation. It was impossible to carry on the government on a cash basis. The State had to run the government on a credit basis or abdicate her functions and let

anarchy reign, and all civil order and protection to life and property cease, and society go to destruction. Should she have chosen the latter alternative? She did not do so, but conducted the government on credit, issuing treasury warrants to represent the expenses incurred. There was nothing novel or illegal in this. The treasury warrants of a State have always been assignable, and are almost invariably assigned, if any interval elapses between their issuance and payment. They are generally receivable in payment of taxes and debts due the State. Why should not a State pay debts due by her with debts due to her? The mere fact that some of her treasury warrants might have been issued in small denominations does not constitute them, and certainly not all others, bills of credit. A treasury warrant issued to a creditor of the State, pursuant to a specific appropriation to pay it, as evidence of an indebtedness actually due to the person to whom issued, never can be a bill of credit or paper prohibited by the State or National Constitutions as unlawful currency, whatever be its form or denomination. *The fact that it was issued on account of a debt and with reference to a specific appropriation is utterly*

inconsistent with its being issued to circulate as money.

It is not found, and no one has yet suggested, that any warrants were issued except upon appropriations duly made by the Legislature. Now, we submit *that warrants drawn by the Comptroller upon the Treasurer, in conformity with the practice prescribed by law since the creation of the State Government, for the purpose only of paying appropriations duly made by the Legislature, and in accordance with the only method prescribed by law for disbursing the funds of the State, cannot, in the nature of things, be deemed bills of credit, or considered as issued with the intention that they should circulate as money.*

We find that in the very legislation providing for the organization of the State Government it was provided, and has ever since been the law, that no money shall be paid out of the treasury, except on the warrants of the Comptroller (Rev. Stat., 1895, Art. 2855). We find, furthermore, that as early as March, 1846, it was made the duty, and has ever since been the duty, of the Comptroller, to "draw warrants on the Treasurer for the payment of all moneys directed by law to be paid out of the treasury" (Rev. Stat. 1895, Art. 2831).

The provision of the State Constitution on which the State relies (Sec. 7, Art. XVI.) was in force when these statutes were passed—indeed, had been adopted less than a year before—and has remained unchanged to this time. These statutes were practically contemporaneous with the Constitution, and have been followed every day since; and it has never been suggested before that they were contrary to the Constitution, and that the Comptroller, in the performance of his plain statutory duty during all these years, was exercising power prohibited by the Constitution. This is sufficient evidence that such warrants were not regarded in any sense as within the constitutional prohibition. As said before, there is no contention that any warrants were ever issued, except in obedience to appropriations made by the Legislature, and in the exercise of the powers conferred and the performance of the duties imposed by the statutes above referred to. What possible difference, then, can it make what the denomination or form of the warrants may have been? It is not denied that they contain all the requisites prescribed by statute. It had not been supposed before that the legality of the warrants depended

upon the color of the paper selected by the Comptroller, the size or form of the sheets, or the extent or character of the engraving appearing upon them. They were issued, as all must concede, to pay appropriations duly made, and in the performance of the duty imposed on the Comptroller. The argument, however, is, in effect, that the obligation of the State depends upon its ability to pay, and that the State's creditor commits an unlawful act in accepting an order on the Treasurer for the money admittedly due him. In other words, the substance of the contention is that a warrant, lawful when the State is able to pay, and which is the only means permitted by law for collecting money of the State, becomes unlawful as soon as the State becomes unable to pay it!

In drawing these warrants the Comptroller was acting under the same statute that he acts under to-day. The language of the warrants—the words used—were the same then as now. The only difference is that the State is now able to pay the warrants. Then it was unable to do so. This condition was not the fault of the creditors, or the Judges of the Courts, or other officers and agents of the State to whom

they were issued. It was due to the act of the State in plunging into the war, and driving all money from circulation, thereby depriving itself of the money with which to pay the warrants, and compelling its creditors to use them as best they could. It is not an unheard-of thing, even in these times, for treasury warrants to become the subject of barter and sale, and to be exchanged by the employees of the State for articles of merchandise, and be used in the payment of their debts. Fortunately such conditions are rare, but they are not unknown, and are liable to recur at any time. The holders of them were no more guilty during the war than the holders of them are to-day. Then, as now, they were circulated, if at all, only through necessity—a necessity brought about by the State itself. *If the State had paid the warrants, they would not, of course, have been circulated. They were passed from hand to hand only because the State was without money with which to pay them, and would have disappeared on almost the very day that the State should secure money with which to meet them.* Can it be held that the inability of the State to pay its just debts outlawed its obligation? In its final analysis this is precisely what

the decision of the Court of Civil Appeals means.

If the warrants in question are not in violation of the State Constitution it would seem to follow that they are equally unaffected by the provision of the Constitution of the United States which declares that no State "shall emit bills of credit" (Art. I., Sec. 10), for, as we understand it, it is necessary that an obligation of a State should have been issued for the purpose of circulating as money before it can be said to be embraced within the provision of the Federal Constitution referred to. In other words, the State Constitution prohibited in express words the issuing of warrants to circulate as money, while by the decisions of this Court the clause of the Federal Constitution has been construed to mean that no State "shall emit bills of credit" to circulate as money.

In Briscoe vs. Bank of the Commonwealth of Kentucky, 11 Pet., 257, 318, the following definition of a bill of credit was given:

> "To constitute a bill of credit within the Constitution it must be issued by a State on the faith of the State, and *be designed to circulate as money*. It must be a paper which circulates on the credit of the State, and is so

received and used in the ordinary business of life."

In Poindexter vs. Greenhow, 114 U. S., 270, the facts so far as material to the present controversy were as follows : The plaintiff owed the State of Virginia twelve dollars and forty-five cents for taxes upon property owned by him in the City of Richmond. The defendant, as the Treasurer of the City of Richmond and Collector of Taxes, demanded of the plaintiff payment of the taxes due by him to the State. The plaintiff, upon such demand, tendered to the defendant in payment thereof coupons issued by the State of Virginia under the provisions of the Act of the General Assembly of that State of March 30, 1871, entitled " An Act to provide for the funding and payment of the public debt." The defendant refused to receive the said coupons so tendered by plaintiff, and, as he deemed that he was required to do under the Statutes of Virginia, entered the plaintiff's place of business and took possession of his desk for the purpose of selling the same to pay the taxes due from him.

The plaintiff, therefore, brought an action in *detinue* against the defendant for the recovery of the desk before a Police Justice in the City of

Richmond, who dismissed the action for want of jurisdiction. An appeal was taken to the Hustings Court for the City of Richmond, which Court was of the opinion that the Police Justice erred in dismissing the case for want of jurisdiction, and that the issues in the action might have been tried by him and that it should be tried by the Court on appeal. The Hustings Court thereupon held that the coupons tendered by the plaintiff in payment of his taxes were not what the law required and that the defendant as tax collector was not required to receive them.

The Hustings Court being the highest Court of the State to which the cause could be taken, a writ of error to that Court was sued out bringing the case before this Court; and, among other objections to the coupons and their acceptance by the defendant when tendered in payment of the plaintiff's taxes, it was urged that they were in violation of the Federal Constitution, which declared that no State should "emit bills of credit" (Art. I., Sec. 10). The great ground of this contention was that the coupons were substantially money and that they were passed from hand to hand, and, as appeared upon their face, were receivable for all taxes, debts and demands

due the State, and that, therefore, these coupons were in effect "bills of credit," and prohibited by the Constitution.

In the opinion of the Court, delivered by Mr. Justice MATTHEWS, these coupons were spoken of as "money" and as being "legal tender." At page 279 it was said: "They [the coupons] were by that act reduced, in effect, into money, and, as between the State and its taxpayers, were a legal tender as money." Again, upon the same page, the Court said: "After a tender of such coupons by a taxpayer in payment of taxes, and a refusal by a tax collector to receive them, the situation and rights of the taxpayer and coupon holder were precisely what they would have been if he had made a like tender in gold coin and it had been refused." The same idea was reiterated on page 281, as follows: "As we have seen, the coupon holder, whose tender of genuine coupons in payment of taxes has been refused, stands upon the same footing in this respect as though he had tendered gold coin in similar circumstances and with like result."

Notwithstanding the view of the Court that these coupons were in effect money for certain purposes, yet when it came to the question of

saying whether they were "bills of credit" within the meaning of the words as used in the Federal Constitution the Court disposed of the matter very clearly and concisely, and decided that the coupons were in no sense "bills of credit," inasmuch as they were not "designed to circulate in the common transactions of business as money." The Court held that there was nothing in the argument that making the coupons receivable in payment of taxes, etc., would tend to make them circulate from hand to hand as money, for, even if it did, this would fall "far short of their fitness for general circulation in the community as a representative and substitute for money in the common transactions of business, *which is necessary to bring them within the constitutional prohibition against bills of credit*" (p. 285).

The opinion of the Court upon this question is as follows, at page 283 *et seq.*:

> "It is objected, in the first place, that the law and contract, by which the quality of being receivable in payment of taxes to the State is imputed to the coupons, is itself in violation of that clause of the Constitution of the United States, Art. I., Sec. 10, which declares that no State shall 'emit bills of credit,' and is, therefore, void.

" The coupons in question are in the ordinary form, and one of them reads as follows :

" ' Receivable at and after maturity for all taxes, debts and demands due the State.

" ' The Commonwealth of Virginia will pay the bearer thirty dollars interest, due 1st January, 1884, on bond No. 2731.

" ' Coupon No. 20.

" ' GEO. RYE, Treasurer.'

" It is contended that this is a bill of credit in the sense of the Constitution, because, being receivable in payment of debts due the State and negotiable by delivery merely, it was intended to pass from hand to hand and circulate as money.

" The meaning of the term ' bills of credit,' as used in the Constitution, has been settled by decisions of this Court. By a sound rule of interpretation it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State governments, of paper money based alone upon credit. The definition thus deduced was not founded on the abstract meaning of the words, so as to include everything

in the nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, but was limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests. Accordingly, Chief-Justice MARSHALL, in Craig vs. Missouri, 4 Pet., 410, 432, said, that 'bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society.' This definition was made more exact by merely expressing, however, its implications, in Briscoe vs. The Bank of Kentucky, 11 Pet., 257, 314, where it was said: 'The definition, then, which does include all classes of bills of credit, emitted by the colonies or states, is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money.' And again, p. 318: 'To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.' The definition was repeated in Darrington vs. The Bank of Alabama, 13 How., 12.

"It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the

sense of this constitutional prohibition. They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. *And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law which au horized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions of business, as money, nor that, in fact, they were so used.* The only feature relied on to show such a design or to prove such a use is that they are made receivable in payment of taxes and other dues to the State. From this it is argued that they would obtain such a circulation from hand to hand, as money, as the demand for them, based upon such a quality, would naturally give. But this falls far short of their fitness for general circulation in the community, as a representative and substitute for money in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. The notes of the Bank of the State of Arkansas, which were the subject of controversy

in Woodruff vs. Trapnall, 10 How., 190, were, by law, receivable by the State in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held that they were not so because they were not issued by the State and in its name, although the entire stock of the bank was owned by the State, which furnished the whole capital and was entitled to all the profits. In this case the coupons were issued by the State of Virginia and in its name, and were obligations based on its credit, and which it had agreed, as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder; but they were not issued as and for money, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance, by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the taxpayers. They do not become receivable in payment of taxes until they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

In Craig vs. State of Missouri, 4 Pet., 410, 431, Chief-Justice MARSHALL said:

> "In its enlarged, and perhaps its literal, sense, the term 'bill of credit' may comprehend any instrument by which a State engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood."

In Pagaud vs. The State of Mississippi, 13 Miss., 491, it was said:

> "The words 'bill of credit' as used in the Constitution of the United States mean 'a paper medium intended to circulate between

individuals, and between Government and individuals, as money, for the ordinary purposes of society.'

"Auditor's warrants, issued under the law of this State, making it the duty 'of the Auditor of Public Accounts to examine, settle and audit all accounts, claims or demands whatsoever, against the State, arising under any act or resolution of the Legislature, and to grant to every claimant authorized to receive the same, a warrant on the State treasury' (H. & H., 270), are not bills of credit, within the prohibited sense of the term; *even though such warrants may have been sometimes used by individual holders as a circulating medium, and a substitute for paper money*" (Syllabus).

See, also,

Gowen vs. Shute, 4 Baxter (Tenn.) 57.
Central Bank of Georgia vs. Little, 11 Ga., 346.

We learn from *Poindexter vs. Greenhow*, *supra*, that evidences of indebtedness issued by a State are not to be considered bills of credit because they are payable to bearer, pass from hand to hand, and are receivable in payment of taxes and of all dues or debts to the State. We learn from the definition given by Chief-Justice MARSHALL that "the word 'emit' is never employed in describing those contracts

by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use."

What, then, is necessary to constitute a prohibited emission of bills of credit? There must be the issuance by a State of its paper evidences of indebtedness, redeemable at a future day, which are *not* issued for services actually received, or for money borrowed for present use, but which are issued with the intention and design *to circulate through the community for its ordinary purposes* as money.

Now let us apply this definition to the treasury warrants issued by the State of Texas, and now claimed to be bills of credit. In the first place, they were issued for services rendered, or, what is legally equivalent thereto, for property received or labor done. They were issued in each case in virtue of legislative appropriations to pay them, and they were issued to persons who, before receiving them, were already creditors of the State for services or other things of value actually received by the State. They were payable immediately on presentation to the Treasurer and when paid were canceled. Hence, the negative mark or element in the definition of a prohibited

bill of credit is wanting, and this is fatal to the State's case. The negative element is an important part of the definition. It was not the intention of the framers of the Constitution to interfere, in the least degree, with the power of a sovereign State to borrow money, or, what is the same thing, to run the government on credit, to create debts for services rendered, etc., and to issue evidences of indebtedness therefor in any form or denomination she sees fit to adopt. The point we make is illustrated by the case of *Craig vs. Missouri*, 4 Peters, 410. In that case the loan certificates, the issuance of which was held to constitute the emission of bills of credit, were not issued for services rendered or things bought by the State. The person to whom they were issued had not rendered any services to the State, or supplied her with something she needed. He was not a creditor of the State. On the contrary, he became her debtor on receiving the certificates, and gave his promissory note therefor. It was manifest that the sole design and purpose of the issuance of the loan certificates was to put them in circulation among the people for ordinary purposes, as money. The distinction between that case and the one now be-

fore the Court is obvious, and has been already sufficiently pointed out.

Let us next apply that element of the definition which relates to the design and intention of the Legislature. It is to be remembered that an unconstitutional intention or design on the part of the Legislature is never presumed. Its existence can be inferred only when the inference is necessary and unavoidable. Now, what is there disclosed by the record in this cause which renders necessary and unavoidable the inference, or which compels the conclusion, that the treasury warrants issued during the war to represent actual indebtedness of the State were issued with the intention that they should circulate as money among the people in their ordinary transactions with each other? There is absolutely nothing in the record which shows that the Legislature intended or designed that those warrants should serve the people as money and be used by them as a circulating medium in their dealings with each other. It is not sufficient to point to laws providing for the receipt of these warrants in payment of debts due to the State and for their disbursement in payment of debts by the State. There is no necessary connection, either of

design or effect, between such legislation and an intention to make the warrants circulate among the people as money in their ordinary transactions. The laws in question relate solely to transactions between the State and her debtors and creditors. Nor does the existence of laws authorizing the issuance of warrants payable to bearer and in small denominations compel the conclusion that it was designed to keep them in circulation as money among the people. It may well have been that the only object of such legislation was to facilitate the retirement of the warrants through payment with them of taxes and other debts due the State (Ramsey vs. Cox, 28 Ark., 366). If the messages of Governors and the reports of Comptrollers, offered in evidence by the State, are considered, it will be seen that her financial policy was founded on the belief that, if the taxes were about equal to the indebtedness she was incurring and issuing warrants for, she could, by making them receivable for taxes, take up the warrants in collecting her taxes. This is inconsistent with an intention to have her warrants constitute a part of the permanent currency or money of the State. We submit that the existence of the unlawful inten-

tion or design, essential to the State's case, has not been shown beyond a reasonable doubt, and, therefore, that the ground of invalidity now under discussion has not been established.

The case of *Braggs vs. Tuffts* (49 Ark., 554), relied on by the State, differs so materially from the case now before the Court that it is entitled to no consideration as authority or precedent. It arose out of a petition for a *mandamus* by Tuffts, presented in 1887, to compel Bragg, a tax collector, to receive in payment of taxes certain treasury warrants issued in 1861 and 1862. The warrants tendered were of the denomination of $1, $5 and $10, and had been issued not only for civil expenses, but also on account of the Arkansas *war* bonds and of expenses incurred by the *military* board. The Court found that the warrants were null and void, because issued under an ordinance of a convention which had been called solely for the purpose of considering what course the State of Arkansas should take in the political crisis, and which had no authority whatever to pass the revenue law providing for the warrants in question. This finding was sufficient to dispose of the case, and the Court need have gone no further. But it further found that the ordinance of May 28, 1861,

under which the warrants were issued, "was essentially a war measure, and its provisions are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the convention intended them as a whole, and if all could not be carried into effect the convention would not pass the residue independently." The ordinance under which the warrants were issued was accordingly declared to be invalid in its entirety, and again it became entirely unnecessary to determine whether or not the warrants were bills of credit. Hence, what was said on that branch of the case should be considered as *obiter dicta.* The Court then took up the question whether the warrants were bills of credit. The following remarks are as applicable to our case as anything contained in the opinion:

> "The legislative intent must be gathered from the terms of the act, which authorizes their issue. It is not sufficient that individual holders have occasionally used the paper as currency in the ordinary transactions of business. Mere acknowledgments of indebtedness by a State, either for borrowed money or services rendered,

> do not fall within the description of bills of credit, provided they are not intended to be put into circulation in the community as money " (p. 162).

If we are to go to Arkansas for the law of this case, we will find it in *Ramsey vs. Cox*, 28 Ark., 366. That case fully supports our contention that the issuance of treasury warrants, payable to bearer, in small denominations, and making them receivable in payment of taxes and all debts due the State, do not evidence a design to have them circulate as money among the people in their ordinary business transactions, and, hence, do not constitute a prohibited emission of bills of credit. So far as the charge now under discussion is concerned, that case is directly against the State, and fully supports the contention of defendants. The question involved in *Ramsey vs. Cox* was the validity of an issuance of treasury certificates or warrants, under legislation providing for their issuance in small denominations, and making them receivable for all taxes and all debts due the State. Of the character of these treasury certificates the Court said: " From these several acts it will be seen that treasury certificates are receivable for

State taxes. They were issued to be used by the persons to whom due, 'or bearer,' and in small denominations, and on bank-note paper, that they might be conveniently used by the people generally for that purpose" (p. 368). The decision upon the charge that the treasury certificates constituted bills of credit is as follows:

> "It has been suggested that these certificates were issued in violation of the Constitution of the United States, and that this section of our Constitution and the legislative acts above quoted, as interpreted, under and by virtue of which they were issued and made receivable, etc., are repugnant thereto. If so, it must be because said certificates are bills of credit, or are made a legal tender. The emission of bills of credit is defined to be the 'issuing of paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day' (4 Kent Com., 408; 2 Story on Const., Secs. 1358–70; *Craig et al vs. State of Missouri*, 4 Pet., 431).
>
> "These certificates were not issued to circulate through the community, for its ordinary purposes, as money; but in every case they were issued as evidences of indebtedness on the part of the State to those to whom they were issued. We see nothing in this to give them the character of bills of

credit. Nor, we apprehend, does their circulation among the people on account of their value in the payment of taxes give them that character.

"Are these certificates made legal tender, etc.? We think not. They are made receivable merely in satisfaction of salary, fees, etc., of officers. The State Government is not bound to pay her officers or public servants any specified amount or character of salary, or to allow them to collect of her citizens any specified amount or kind of fees for their services, unless the same be fixed by the Constitution of the State, which is not the case here. The matter of compensation is subject entirely to the control of the people, or the control of the Legislature when not inhibited by the people in their Constitution. Officers must exercise the privileges or franchises of their offices for the kind and amount of pay that the lawmakers may prescribe, or resign their positions."

We submit that the defendant in error can find no aid or comfort in the jurisprudence of Arkansas.

VI.

REGARDLESS OF THE FORM OF THE WARRANTS AND THE VALIDITY OF THE ACTS OF THE LEGISLATURE ASSAILED BY THE COURT OF CIVIL APPEALS, THE WARRANTS SURRENDERED TO THE STATE BY THE RAILROAD COMPANIES REPRESENTED VALID OBLIGATIONS OF THE STATE, AND THEIR DELIVERY TO AND ACCEPTANCE BY THE STATE WERE LAWFUL PAYMENTS IN EXECUTION OF THE CONTRACT.

It is important to clearly understand and bear in mind, throughout, the precise ground of the ruling of the Court of Civil Appeals, upon which its judgment is based, and the effect of such ruling upon other issues previously in the case. All questions respecting the issuance of warrants or the enactment of laws in aid of the so-called rebellion are eliminated by the decision of the Court of Civil Appeals. So also is eliminated all question respecting the purposes for which the warrants were issued. The decision is necessarily based upon the assumption that the appropriations for which the warrants were issued were made for lawful purposes only. *It deals only with the form of the orders drawn by the Comptroller upon the Treasurer for the pay-*

ment of appropriations duly made by the Legislature for lawful purposes.

The proposition necessarily involved in the holding of the Court of Civil Appeals is that the fact (if it be a fact) that the evidence of a valid indebtedness is illegal in form suffices to invalidate and render null the subsequent payment of this valid indebtedness, and the cancellation of the alleged illegal evidences thereof.

Take a concrete example: Suppose the State of Texas owed a judge one hundred dollars on account of his salary, and issued to him a warrant under the same laws pursuant to which the warrants now attacked were issued. Suppose the judge tendered the warrant or warrants (which the State claims must be considered bills of credit) to the tax collector, or some other proper officer of the State, who accepted the same in payment of a hundred dollars of taxes, or some other debt due the State, and gave the State's receipt therefor, the officer acting under authority of the laws cited by plaintiff, directing the receipt of treasury warrants in payment of taxes and other debts due the State. Is this Court prepared to hold that, after the war, the State could disavow the transaction, treat it as

an absolute nullity, and recover from the judge the taxes or the debt to discharge which his warrants had been accepted and canceled? If not, then we ask the Court to consider whether there is any essential difference between the supposed case and the one at bar. The legal proposition upon which the contention of the State is essentially based is that the mere fact of the illegality of the form of the evidence of an indebtedness of the State, no matter how lawful and valid the indebtedness, is sufficient to render absolutely null a transaction involving the use of the illegal evidence of the debt, but resulting simply in the State discharging her valid indebtedness by giving a discharge of an equal amount of indebtedness owing to her. If this proposition is sound it covers the supposed case, and it strikes with nullity all payments of taxes or land-office fees or other debts due the State, made in treasury warrants, and practically every other financial transaction made between the State of Texas and her citizens during the four years of the war.

The State Government during the war owed to the people of the State the duty of preserving the peace and good order of society, of protecting

life and property, providing for the transfer of property, the enforcement of rights and the redress of wrongs, and the performance of the other functions of a civilized government. In the second place, the performance of these duties entailed the necessity of employing and compensating sheriffs, police and other public officers, judges, clerks of court, magistrates, recorders, etc.; it involved the necessity of providing office force for the administration of the fiscal affairs of the State, and the collection and disbursement of the public revenues; it rendered necessary provision for all the usual governmental machinery needed for the administration of the internal affairs of a great State. In the third place, the employment of the officers and agents necessary to enable the State to perform its proper functions involved the necessity of paying salaries, and the ordinary administration of government involved, of course, the constant incurring of expenses and the creation of debts and obligations on the part of the State. Now, the first step in the payment of salaries or other expenses of the State, after legislative appropriation, was the drawing of treasury warrants by the Comptroller. It is an historical fact

that there was practically no gold or silver or United States currency in circulation in the Southern States during the war. Hence the treasury warrants could not be immediately paid in money, and remained outstanding. If the warrants were of no value no one would take them, and the State Government would come to an end. The effect of the legislation in question and its obvious purpose were to give value to these warrants and to provide for their payment, and the object and desire of the Legislature in enacting the laws in question, so far from being reprehensible, were commendable and absolutely necessary to enable the government to accomplish the only purpose for whcih it had a right to exist; namely, to provide and maintain the necessary governmental means and agencies for the protection of the lives and property of its citizens.

In the Bond Debt Cases, 12 Sou. Car., 200, it was held that "bonds of the State issued in payment of outstanding bills receivable, for which the State had received value, are valid and binding obligations, even though such bills should be considered bills of credit. The Constitution of the United States does not prohibit a State from

paying bills of credit" (Syllabus). The Court in the opinion said at page 284 :

> " The next ground upon which this act is claimed to be unconstitutional is that bills receivable are bills of credit, and are, therefore, within the prohibition contained in Article I., Section 10, of the Constitution of the United States, which declares that ' no State shall * * * emit bills of credit.' Whether bills receivable are bills of credit within the meaning of that clause of the Constitution of the United States it is not important for us now to consider, inasmuch as such a question is, in our judgment, wholly immaterial to the inquiry in which we are engaged. It will be observed that the prohibition is against the issue of such bills—not against their payment. If, therefore, these bills are of the character claimed for them, it may be that they would be invalid and worthless as legal obligations in the hands of those who happened to hold them, and that if the question were whether the payment of such bills could be enforced, or whether the officers of the State should be restrained from issuing them, the position taken by the attorney-general would be entitled to great consideration. Such, however, is not the question. It is not, and cannot be, denied that these bills were issued by the proper officers of the State, under an act of the gen-

eral assembly purporting to confer authority for so doing, and that the State received full value for them. When the state government was reorganized in 1868, they found these bills outstanding, and, even though it should be admitted that they were unconstitutional in form, they nevertheless represented valid and *bona fide* indebtedness of the state. If the state saw fit, voluntarily, to recognize such indebtedness, even though it stood in a form which affected its legal obligation, and provided for paying it or funding it in a form to which there could be no constitutional objection, we cannot conceive how such an act on the part of the state, in conformity, as it was to the plainest dictates of common honesty, can be regarded as in violation of the Constitution of the United States. So far from emitting or issuing paper supposed to be within the prohibition of that Constitution, the state, on the contrary, made provision for the withdrawal of such paper from circulation, and replacing it with other evidences of indebtedness in a form which would not be amenable to such constitutional objection."

It is important to notice that the Court below does not once refer to any specific acts of the Texas Legislature which show that the treasury warrants were intended to circulate as money.

In the opinion it was said: "We find that the defendant made the payments pleaded in its answer, but that such payments as were made in State warrants were treasury warrants *intended* by certain acts of the Legislature of the State to circulate as money" (Record, p. 212). No more definite statement as to what acts were referred to is given by the Court.

Assuming for the purposes of argument that the acts were unconstitutional, does an act of the Legislature which attempts to make a treasury warrant good as money, which attempts to make a treasury warrant good as legal tender, and by reason of its unconstitutionality makes such treasury warrants null and void for such purposes, make that warrant, which in its inception was proper and legal and not issued for the purpose of circulating as money, void for all purposes. In other words, is the warrant, which might possibly be void if attempted to be used for the purposes mentioned in the acts referred to by the State Court and industriously collated upon the brief of defendant in error, void when used for an entirely proper and legitimate purpose in no way prohibited by the Constitution? That is, it was always open to the State to say,

as it has done in the Acts of 1861, 1863 and 1864, that, in the case of mutual debts between itself and its creditors, the latter could offset the treasury warrants held by them against their indebtedness to the State, and such right cannot be defeated, and any completed act under such an offer cannot be considered void and of no effect simply because of another statute declaring that treasury warrants can be used for another purpose which the State Court says is in violation of the State Constitution. To put the situation in another form, the acts referred to by the State Court as tending to show that the treasury warrants were intended to circulate as money may be unconstitutional and the use of the treasury warrants for the purposes indicated by such acts may be unconstitutional and the warrants when tendered for any such purpose may be null and void; but, because of this such treasury warrants are not void for all purposes, and, when used for a proper and legitimate purpose not in violation of the State Constitution, are as good as if the laws referred to by the State Court had never been passed.

We desire to call the attention of the Court to the fact that the statutes which are said to be

unconstitutional all relate to the use as money of treasury warrants which have been or may be issued. The vice sought to be corrected by the Constitution was the "issuing" of warrants to be circulated as money, and not to the use for money of warrants already issued. To provide that warrants properly issued could incidentally be used as money does not seem to fall within the meaning of the words used in the Constitution to prohibit the "issue" of warrants to circulate as money. While no one perhaps could be compelled to receive such warrants as money because of the unconstitutional character of the legislation which should try to effect such result, yet it is clear that the warrants would not be rendered void when used for purposes which were perfectly legitimate and were not in violation of any provision of the Constitution. An examination of the act most relied upon by defendant in error, and found at the bottom of page 25 of its brief, simply enacts that a public officer who shall HAVE received treasury warrants shall disburse the same as money *if the persons entitled to have a disbursement will receive them as money* (Acts of 1862, p. 38). It is to be observed that the act refers to warrants

previously issued, and that there is nothing obligatory about receiving the warrants as money. They are not made legal tender, but any person who wishes to receive them as money can do so. It is further to be observed that treasury warrants, when received by a public officer in adjusting a balance due to any one entitled to a disbursement, are not to be reissued, which tends to show that they were not to circulate as money. Certainly a law which clearly relates to previously issued warrants, and merely declares that such a warrant can be disbursed as money if anybody is willing to so receive it, can hardly be said to come within the prohibition of a clause of a Constitution which says that "in no case shall the Legislature have the power to *issue* treasury warrants * * * intended to circulate as money."

Our position is that the treasury warrants in this case were issued by the State, as they always had been before and always have been since, for the purpose of carrying on the business of the State. They were orders issued by the Comptroller upon the Treasurer, and were simply evidence of the indebtedness of the State to be paid whenever presented to the Treasurer. At the

particular time in question the State had no money to pay said warrants, but it said to the railroads, in the Acts of 1861, 1863 and 1864, " You are indebted to me upon the school-fund loans, and I am indebted to you upon my treasury warrants which you hold. You may offset the one indebtedness against the other."

Such was the contract between the railroad companies and the State of Texas, and, as it seems to us, such contract and the rights acquired thereunder cannot be set aside and the treasury warrants used to pay the school-fund loans declared unconstitutional and void, as being issued to circulate as money, by saying that the Legislature passed some act, in no way connected with the transactions here, about the time that the treasury warrants were paid, enacting that treasury warrants theretofore issued might be used as money if anybody would take them as such.

We, however, insist that not a treasury warrant paid by the railroads to the State on account of the school-fund loans has been shown by the evidence in this case to have been issued in violation of the provision of the State Constitution, which enacts that

> " in no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money" (Art. VII., Sec. 8, Constitution of Texas of 1845).

There has not yet been pointed out in all the legislation of Texas prior to or since the time of the payment of the treasury warrants in question a single statute authorizing the issue of treasury warrants to circulate as money. The Court below did not attempt to do so, but simply contented itself with the statement that it was the purpose of " various acts of the Legislature of the State during the period of the war " to give to the warrants issued at that time a standing and character as money (Rec., p. 214). We venture to say after an examination of the Texas statutes that there is not a law of the State authorizing the issue of treasury warrants which provides, or attempts to provide, that they shall circulate as money.

As we have before pointed out, the only statute which would violate this provision of the State Constitution is a law which authorized the issue of treasury warrants, and did so with the intention that they should circulate as money. It is possible that warrants issued under such a law

might be void, as the law would perhaps be unconstitutional, but surely warrants issued under a law which did not intend at the time of its passage that warrants issued thereunder should circulate as money could not be vitiated by reason of the passage of an act subsequent to the law under which the warrants were issued, but prior to the actual issue of the warrants, which simply permitted the officers of the State authorized to receive public money to receive such warrants "as money," and disburse them "as money" if the person entitled to have a disbursement will receive them "as money."

We have stated the case of the State in a far stronger form than has been proved in the record, but even in this form, as it seems to us, no case is made under which the treasury warrants could be said to be in violation of the Constitution. In other words, State treasury warrants cannot be said to be void and unconstitutional unless the act under which they are issued is in violation of the State Constitution, and the law under which a warrant is issued (if not unconstitutional at the time of its passage) cannot be made so by a subsequent act which might attempt to make warrants issued under the first

and prior act circulate as money. Now, there has been no attempt to show that any law under which any warrant delivered and paid to the State by the railroads was issued provided that such warrant should circulate as money, and the entire contention of the State of Texas, that these warrants were void and in violation of the State Constitution, is based upon the fact that a law was passed in 1862 authorizing public officers to receive warrants issued under some other law "as money, except when expressly prohibited by some other law," and to pay out warrants received by them prior to the passage of the Act of 1862 as money if the parties entitled to a disbursement should be willing to receive them as money.

It is very clear from its terms that the law of 1862 never intended to make treasury warrants previously issued under some other law, or subsequently issued pursuant to the provisions of other acts of the Legislature, legal tender. The whole character of the act shows that it refers simply to the acts of its disbursing and receiving officers, and permits such officers to disburse such warrants if the party entitled to receive

such disbursement is willing to take warrants and allows its receiving officers to receive the evidence of its own indebtedness as a set-off against indebtedness to it. These provisions would seem very far from making warrants authorized by some other act of the Legislature legal tender, and do not disclose any intention to make such warrants circulate as money among the general public, which is, we take it, the only meaning in which the words are used in the State Constitution. The utmost that can possibly be said of the Act of 1862 is that it provided for the use of warrants for purposes prohibited by the Constitution, and that it was therefore unconstitutional; but, as we have said more than once, that cannot affect warrants issued under some other act, and used for purposes in no way falling within the ban of the provisions of the State Constitution.

Assuming that the treasury warrants were void as being in violation of the State Constitution, which prohibited the issue of treasury warrants to circulate as money, it is not at all plain that it could affect the contracts in this suit. No one disputes that at the time these treasury warrants were paid to the State by the railroad companies

they had a market value of ten cents upon a dollar (Record, p. 166). Such value existed without any regard to whether they had been issued in violation of the State Constitution or not. The railroad companies could have sold them for this much at least. They were things of value. The delivery of them to the State was the surrender to it of articles of a recognized money value, and they had been received by the railroad company at their par value. The consideration of the contract on the part of the railway companies was two-fold—it was the giving of transportation on its railroad and receiving therefor treasury warrants at their face value instead of at their true market value, and the surrender to the State of the evidence of its indebtedness, which they could have sold for at least ten cents on a dollar.

There was, therefore, a perfectly good consideration rendered by the railroad companies, whether the treasury warrants were void or not, and whether they were issued to circulate as money or not ; and, if the value of the consideration performed by one party remains and is unaffected one way or the other by the constitutionality thereof, it is not plain how the contract itself can be affected by the question of whether

the consideration of the contract was void, as being in violation of the State Constitution.

It would certainly seem as if a creditor was entitled to determine in what his debt should be paid, and, having once so determined, must be bound thereby. If a creditor chooses to receive something other than money in settlement of what is due him, it is not clear why he should not do so, and it would seem to be immaterial whether the medium of payment selected by him was illegal, so long as he preferred that the payment should be made therein.

In Planters' Bank vs. Union Bank, 16 Wall., 483, the Court below instructed the jury that payment of a claim in Confederate notes was not a good payment. In this court it was not necessary to pass upon the question, but the remarks made by Mr. Justice STRONG at page 494 would seem to imply that a creditor had a right to accept payment in anything he saw fit, without regard to its illegality. It was there said:

> "It might be difficult to maintain, if the military authorities were clothed with the rights of creditors—that is, if they had succeeded to the position and title of the plaintiffs—that they could not determine

> what funds they would receive in payment of the balance on the defendant's books to the credit of the plaintiffs. It is not perceived why they could not accept Confederate notes in discharge of a debt which had become due to them."

If the payment of a creditor in Confederate notes is a sufficient payment of the debt, provided the creditor selects such medium of payment, it would seem as if the payment in treasury warrants was equally a discharge of the debt in a case where the creditor had chosen such manner of payment.

No objection can be taken to the railroad companies having performed the conditions precedent required by the Acts of 1861, 1863 and 1864, and to the subsequent acceptance of such performance by the act of the State in giving credit to the railroad companies for the State treasury warrants delivered by them to the State in payment and satisfaction of the interest upon the school-fund loans.

It is, further, beyond question that the railroad companies rendered a good and valuable consideration to the State in return for the credit given them by the State on account of the school-fund loans. The situation was this: The

State treasury warrants, at the times in question, were worth considerably below par. They had a certain value, but it was below their face value. The State, in effect, said to the railroads that, if they would receive these warrants from their shippers and passengers at par instead of at their actual value, it would also receive the warrants from them at par instead of at their actual value. It must be constantly borne in mind that, during all this time, these State warrants had an actual market value. It was at least ten cents on the dollar (Rec., p. 166). The consideration of this contract, therefore, performed by the railroad companies, consisted (1) in having, at the request of the State, given transportation at a greatly-reduced rate by receiving treasury warrants at par instead of at their market value. That is to say, if the regular rate established by law for a shipment of freight offered to the railroad was one dollar ($1) per thousand pounds, the railroad company received and transported such freight for ten cents a thousand pounds. (2) A further consideration performed by the railroad companies was the surrender to the State of its evidences of indebtedness, when the railroads could

have sold them and realized therefrom at least one-tenth of their face value.

The consideration, therefore, of this contract was good and valuable, and its virtue in forming part of a perfect contract between the railroads and the State would seem unaffected by any question of whether the treasury warrants paid by the railroads to the State were void, as being issued in violation of the State Constitution. Even if they were, yet such warrants were of a definite market value, and their surrender to the State was a surrender of things of value, and, in consideration of such surrender, the State agreed to give the railroad companies credit on account of the school-fund loans to them, and when the other branch of the consideration of this contract is considered—viz., the giving of transportation at the established rates and taking these treasury warrants at ten times their market value in return therefor—it would seem as if nothing further need be said to show that the consideration of this contract was ample and sufficient, and entirely unaffected by the question whether the treasury warrants were void, as being issued in violation of the State Constitution.

Whether the warrants were unconstitutional or not, they had a market value and it was a damage to the railroads to receive them at par instead of at their actual value, and also a damage to surrender them to the State. Such damage, therefore, constituted a good consideration for the contract between the State and the railroads and is entirely unaffected by the constitutionality or unconstitutionality of the warrants.

In Hendrick vs. Lindsay, 93 U. S., 143, 148, the Court said:

> "Damage to the promisee constitutes as good a consideration as benefit to the promisor. In Pillan vs. Van Mierop, 3 Burr., 1663, the Court say: 'Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

In the case of Violett vs. Patton, 5 Cr., 142, 150, it was said by Chief-Justice MARSHALL that:

> "To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows

> from the person to whom it is made, and that the promise is the inducement to the transaction."

In Townsley vs. Sumrall, 2 Pet., 170, 182, the Court, speaking through Mr. Justice STORY, concisely stated the rule as follows:

> "Damage to the promisee constitutes as good a consideration as benefit to the promisor."

The present case certainly comes within the rule indicated in the authorities just referred to, and though possibly it might be said that the State of Texas had received no benefit from the surrender to it of its evidences of indebtedness because the treasury warrants were unconstitutional, and therefore null and void, yet the damage to the promisees (the railroad companies) induced by and resulting from the promise and offer of the State was very clear and two-fold in its nature. It consisted (1) of the furnishing of transportation at about one-tenth of the rate allowed by law, and (2) of the surrender of treasury warrants which had a definite market value, and from which the railroads would have realized at least one-tenth of their face value if

they had not delivered them to the State of Texas under the terms of its promise.

In support of our proposition that, even if the treasury warrants were void because in violation of the State Constitution (which we deny), they still had a money value, and therefore constituted a valuable consideration for a contract, we refer the Court to Thorington vs. Smith, 8 Wall., 1, where it was substantially held that Confederate treasury notes, though issued in aid of the Rebellion, and therefore void, had a "certain contingent value," and therefore constituted a good consideration for a contract for the sale of land, inasmuch as such contract had nothing to do in itself with aiding and promoting the Rebellion.

The facts in the Thorington case are as follows: Thorington in 1864 sold to Smith a piece of land adjoining the City of Montgomery, Alabama. The price agreed to be paid for the land was $45,000. Of this sum $35,000 in Confederate States treasury notes were paid at the execution of the deed, and for the residue a note was executed containing a vendor's lien on the property for the amount thereof. After the war Thorington filed a bill to enforce his vendor's lien, claiming the $10,000 in the money then current—

to wit, lawful money of the United States. The answer set up the circumstances at the time the contract was entered into and insisted that the note given for the $10,000 was to be discharged in Confederate notes, and that, therefore, the vendor was not entitled to any relief in a court of the United States.

A witness, who negotiated the sale, was offered to show that it was understood and agreed that the note should be paid in Confederate notes, as the $35,000 had been. The Court admitted the evidence to prove that the note was, in fact, made for payment in Confederate notes, and *then dismissed the bill upon the ground that the contract was illegal, because to be paid in such notes.*

One of the questions presented to this Court, and answered in the affirmative, was:

> "Can a contract for the payment of Confederate notes, made during the late Rebellion between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?"

In the consideration of this matter the Court said, at page 11, as follows:

> "To the extent, then, of actual supremacy, however unlawfully gained, in all

matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity, but a duty. Without such obedience civil order was impossible.

"It was by this government exercising its power throughout an immense territory that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, *these notes were nullities*, for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only 'after the ratification of a treaty of peace between the Confederate States and the United States of America.' While the war lasted, however, *they had a certain contingent value* and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

"It seems to follow as a necessary consequence from this actual supremacy of the

insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. *Contracts stipulating for payments in this currency cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame except when proved to have been entered into with actual intent to further invasion or insurrection.* We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer."

In Hannauer vs. Woodruff, 10 Wall., 482, a somewhat similar question arose, and this Court was equally divided; but subsequently and in the case of Delmas vs. Insurance Company, 14 Wall., 655, the Thorington case was approved, and the

somewhat conflicting decision in the Hannauer case, arising from the equal division not only of this Court, but of the Court below, was disapproved.

The facts in the Hannauer case are of much interest upon this branch of the discussion. Woodruff made and delivered to Hannauer a promissory note, and the only consideration of the note was certain bonds issued by an ordinance of the convention which attempted to carry the State of Arkansas ont of the Federal Union by what is called the "Secession Ordinance." These bonds were issued for the purpose of supporting the war, and were styled " War Bonds " on their face, and the purpose of their issue was well known to both parties to the note.

The bonds had at the time of the transaction a value not much below their par value on their face, say ten per cent., at Memphis and in Arkansas.

The war bonds received by Woodruff were not used or intended to be used by him in support of the war.

Upon these facts a question of law arose as to which the judges of this Court and of the Court below were divided in opinion, to wit :

" Was the consideration of the note void on the ground of public policy, so that no action could be sustained on it in the Federal courts ? "

The view of one-half of the judges who sat in this case seems to have been that, though the war bonds were null and void as having been issued in aid of the Rebellion, yet they had a money value, and therefore constituted a good consideration for a contract which had nothing to do with the support of the Rebellion, and the view of such half of the judges sitting in this case is apparently sustained by the subsequent case of Delmas vs. Insurance Company, 14 Wall., 661, 665, where it was said by Mr. Justice MILLER at page 665 :

> " In regard to the first of these propositions this Court has decided in the case of Thorington vs. Smith that a contract was not void because payable in Confederate money ; and, notwithstanding the apparent division of opinion on this question in the case of Hannauer vs. Woodruff, we are of opinion that, on the general principle announced in Thorington vs. Smith, the notes of the Confederacy actually circulating as money at the time a contract was made may constitute a valid consideration for such contract."

Perhaps the last decision of this Court upon the question is Effinger vs. Kenney, 115 U. S., 566, when Mr. Justice FIELD delivered the opinion of the Court and said at page 573:

> " It would seem, therefore, to be no longer open to question that, where contracts were made in the insurgent States during the war between residents of those States, with reference to Confederate notes as a standard of value, *and were not designed to aid the insurrectionary government*, they may be enforced in our courts."

Again, at page 575, it was brought out in unmistakable language that, although the Confederate notes were unlawful and illegal, yet as they had a value they could constitute a sufficient consideration for a contract. On this point it was said:

> " The treasury notes of the Confederate States constituted under the laws of the United States neither lawful property nor lawful currency. They were the promises of an insurgent and revolutionary organization, payable only when its success should be established by a treaty of peace with the United States. Of the value of such promises the National Courts will make no inquiry, *except as they were receivable in contracts not designed to further the insurrec-*

tion. * * * Their intrinsic value was nothing, but their exchangeable value, by reason of their enforced circulation, was the estimate of them at the time in lawful money of the United States."

See, also,

The Confederate Note Case, 19 Wall., 548.

Wilmington & Weldon Railroad Co. vs. King, 91 U. S., 3.

Stewart vs. Salamon, 94 U. S., 434.

Cook vs. Lillo, 103 U. S., 792.

Rives vs. Duke, 105 U. S., 132.

In *Dull vs. Gordon*, 24 La. An., 478, plaintiff sought to ignore partial payments made, during the war, in unlawful currency, and to recover the total amount of the debt, but the Court said, at page 479:

"It appears that the five hundred dollars paid on the nineteenth of March, 1864, was in Confederate treasury notes; and it is also probable that the item of seventy dollars was paid in Confederate notes; and it is urged that, because these payments were made in that currency, we cannot allow them as credits. When payment of an obligation has been received by the obligee in Confederate treasury notes the Courts will not interfere; *to the extent of the payment it is an executed contract.*"

We know of no case holding that a party who accepted, without objection or coercion, any paper issued during the war in payment of a debt, had a right, after the war, to repudiate the payment, and recover the debt. Even the Supreme Court of Texas always upheld such transactions prior to this case. In *Van der Hoven vs. Nette, 32 Tex., 183*, it was held that payments accepted in Confederate money without objection could not be avoided on the ground that the plaintiff stood in dread of the so-called rebel authorities, who then threatened all persons who refused to accept Confederate money in the discharge of debts. In *Ritchie vs. Sweet, 32 Tex., 333*, it was held that the payment of a note made before the war with Confederate money during the war, and the surrender of the note upon such payment, was an executed transaction, against which no relief would be afforded.

The case of *Piegzar vs. Twohig, 37 Texas, 225*, is directly in point. A vendor of land accepted, during the war, Confederate money in payment of some of the purchase-money notes. After the war he declined a tender of the balance due after deducting such payments, and refused to perform the contract to convey, unless the whole

amount, including the amount paid in Confederate money, was again paid. The purchaser brought suit for specific performance, and the Court held that the vendor, having accepted Confederate money without objection, was bound thereby, and was compelled to convey the land on payment of the balance after deducting the amount paid in Confederate money. In *Allen vs. Baker, 39 Texas, 220*, it appears that Allen's wife, upon an order from him on Baker, accepted from Baker Confederate money in part payment of Baker's obligation. Allen subsequently died, leaving his widow as executrix and sole legatee under his will. The widow qualified as executrix, and accepted the remainder of the debt in Confederate money. Subsequently she sought to repudiate these payments and recover on the original obligation without allowing credit for the payments in Confederate money. The Court held that she was bound by the payments, and was not entitled to recover. In *Long vs. Walker, 47 Texas, 173*, it was held that a payment in Confederate money was valid, because it was treated by the parties as valid when made. See, also, *Burleson v. Cleveland, 32 Texas, 397; Rodgers vs. Bass, 46 Texas, 505; San Patricio*

County vs. McClane, 44 Texas, 392; Roberts vs. Schultz, 45 Texas, 184; Dull vs. Gordon, 24 La. Ann., 478; Heirs of Brown vs. Jacobs, 24 La. Ann., 526. Authorities might be multiplied from other States to the same effect.

We, therefore, confidently submit that, even if the treasury warrants in this case were null and void as in violation of the State Constitution (which we deny), they at the same time had a money value, and were not being used at the time of these transactions in a way which violated the letter or spirit of the State Constitution, and, therefore, constituted a perfectly good consideration for the contract between the State of Texas and the railroad companies, and the agreement between them was, therefore, not void.

The case of Little Rock vs. National Bank, 98 U. S., 308, is most instructive. The City of Little Rock, Arkansas, in 1867 provided for the issue and redemption of its bonds, which in violation of law were printed upon bank-note paper. By this issue of bonds it obtained the means with which, among other things, it erected many public improvements and paid the salaries of its officers and agents. The city received

these bonds in payment of taxes and other dues, and to some extent reissued them when its occasions required. The value of the bonds diminished from time to time, *until it became merely nominal*, and in 1873 the City Council adopted an ordinance "for the redemption of outstanding city bonds in banknote paper."

The Merchants' National Bank of Little Rock was the lawful holder for value of a large number of overdue bonds of that description issued to other parties in payment of valid claims against the city, and in accordance with the terms of the ordinance surrendered the bonds to the City Council by whom they were canceled. For a portion of the bonds so surrendered the bank received new bonds of the city. For the rest of the surrendered bonds *the city acknowledged its indebtedness by giving the bank credit therefor on the books of the city.*

The bank brought suit against the city upon the new bonds and also to recover the amount which had been credited to the bank upon the books of the city.

The city, among other defenses, pleaded that the bonds surrendered were issued in violation of the statute, and that the credit entered upon

the city books was without authority of law or *valuable consideration.*

The case was tried and the jury returned a verdict in favor of the bank, and the defendant the City of Little Rock sued out a writ of error to this Court, which affirmed the judgment of the Court below.

The lower Court held that the original issue of bonds in 1867 was illegal for much the same reason that it is now claimed by the State of Texas that the Treasury warrants in this case were illegal. This Court held that it made no difference whether the original bonds were legal or illegal, but that their surrender, even in the event that they were illegal, was a good consideration for the credit given by the city to the bank. In the course of his opinion, Mr. Justice HUNT, who delivered the opinion of the Court, which was unanimous, said at page 313:

> " Upon this state of the law the Judge at the Circuit was of the opinion that the original issue of its notes by the City of Little Rock was illegal. It is not necessary that we concur in this view or that we should dissent from it. We have referred to the statutes that the actual position of the parties towards each other might be

understood, and the point on which the decision in favor of the bank was made be appreciated.

" There was evidence that the bonds sued on *and the ledger accounts sued on* were given and allowed on the immediate consideration of the surrender of bonds of the form, character and material first issued by the city. The Court charged as follows, viz.:

" ' That the bonds in suit issued by the defendant in lieu of said bonds on bank-note paper—the last-named bonds having been originally issued under the circumstances above stated for valid debts against the city to other creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue—constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank-note paper were of such an appearance and of such a form as to be especially adapted to constitute a circulating medium, and were, in fact, used in and about the city as a local circulating medium in lieu of money.

" ' *There is also a claim against the city for the amount of certain city bonds on bank-note paper surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff aud destroyed by the city to the credit of the plaintiff on the ledger of the city.* The same prin-

ciples of law apply to this claim as to the claim on the new bonds.' * * *

"We think the charge as quoted was right."

It is not easy to see that any material distinction can be drawn between the present case and the case cited.

In the latter the city claimed that the surrendered bonds were illegal because issued contrary to an express statute, and that the surrender of an illegal bond did not constitute a good consideration for a credit given by the city upon its books to the party surrendering the bonds. In the present case the State claims that the treasury warrants were illegal, because issued in violation of the State Constitution, and that their surrender therefore did not constitute a good consideration for the credit given by the State upon its books to the railroads which surrendered the warrants.

The two cases would seem to be precisely the same, and, as this Court held in the Little Rock Case that the illegality of the bonds did not prevent their surrender from being a good consideration for the credit given by the city upon its books to the party surrendering the bonds, it

would seem to follow that the surrender of the treasury warrants by the railroads constituted a sufficient consideration for the credit given to them therefor upon the State's books, without any regard to whether such treasury warrants were or were not in violation of the State Constitution.

The Supreme Court of Arkansas in the case of Bragg vs. Tuffts, 49 Ark., 554 (a case upon which counsel for the State placed so much reliance as authority for the proposition that these warrants were bills of credit, in which connection we have already discussed it), felt constrained to guard against any implication that it regarded the warrants there involved otherwise than as meritorious and at least moral obligations of the State. In concluding the opinion the Court observed at page 567:

> " Nothing herein, however, must be construed into an expression of opinion that no moral obligation rests upon the Legislature to provide for them [the warrants]. The majority of the claims upon which they were issued are as meritorious as the salaries of the present State officers. And the holder of the warrants ought to be considered as the equitable assignee, *pro*

> *tanto*, of the claims, and subrogated to all the rights and equities of the original claimants."

Would any court of conscience, holding the views expressed by the Arkansas Court, permit the State to repudiate a transaction involving the discharge by it of such moral obligations? It is an established principle of the Roman law that no suit will lie to recover what has been paid or given in discharge of a moral obligation, called, in the nomenclature of the civil law, "natural obligation." For instance, the Civil Code of Louisiana, following the Code Napoleon, defines a natural obligation to be "one which cannot be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice" (Art. 1757); and, in stating the characteristics of a natural obligation (Art. 1759), declares that "no suit will lie to recover what has been paid or given in compliance with a natural obligation." It is an historical fact that the great body of the principles of equity come from the civil law. If a State has issued to a creditor an evidence of indebtedness which turns out to be illegal in form, does it cease to owe the debt? Is it not its duty

to take up the illegal evidence and pay it or issue a valid warrant in its place? Upon what principle of law or equity can the State of Texas treat the honest discharge of her debts as illegal and invalid—an absolute nullity?

We have affirmed, by the Court of Civil Appeals, the extraordinary proposition that the State may repudiate the debts which these warrants were drawn to pay, and recover from one of its creditors a debt canceled at its instance by the surrender and cancellation of the State's own obligations, simply because of the *form* of the paper which the State gave to its creditors. It cannot be denied that the State is to-day morally and legally bound by every warrant it issued, during the war, for lawful purposes. The lawful holder of every treasury warrant issued, during that period, for the payment of salaries of the State's judicial, executive and legislative officers, and for other lawful purposes, has a just and lawful claim against the State to-day. All that exempts the State from liability thereon is its immunity from suit by reason of its sovereign character. But here the State has come into court, and without any reason to

deny its liability is seeking to avoid payments made to it by one of its creditors in this very paper. In other words, it demands from one of its creditors what it claims to be due, and refuses to allow as an offset or credit a debt due by it, and that, too, where the settlement has already been made. The State's indebtedness has been extinguished *pro tanto* by the cancellation of its lawful obligations surrendered by its creditors, and yet it seeks to avoid allowance of credit therefor, and endeavors to have the transaction re-opened.

So we say that, whatever these warrants were in *form*, they were in *fact* lawful evidences of obligations upon the part of the State; and, if it be true that they were dealt in, it was only because the State's Treasurer, on whom they were drawn, and whose duty it was to pay them on demand, was without money with which to pay them; that if the State had met them, as it was legally and morally bound to do, they would not have circulated at all; and the State cannot annul its indebtedness, and render its obligations illegal in the hands of its creditors, by withholding payment and disabling itself

from paying them. The State itself brought about the conditions that forced the warrants to circulate, and by its own conduct drove all lawful money out of circulation and compelled its creditors to use its evidences of indebtedness as best they could.

The railroad companies are not proceeding upon the warrants. They are not asking any relief upon them. All they ask is that the transaction in which they engaged at the instance of the State, and which was deemed by both parties at the time lawful in all respects, and which operated to extinguish the indebtedness of the State to the same extent that their own indebtedness was extinguished, and which was fully executed at the time, be upheld.

FOURTH POINT.

The Act of August 13, 1870, impaired the obligation of the contract between the State of Texas and the railroad companies arising under the Acts of 1861, 1863 and 1864.

By reason of the war the railroad companies had been unable to comply with the conditions of the school-fund loan, and their roads were liable to be sold for noncompliance therewith. To relieve the railroads from this liability the Act of August 13, 1870, was passed. The portion of the law which it is more important to notice is the provision which enacts that any railroad company which is indebted to the State upon loans from the Special School Fund may avoid the sale of its road by the payment into the treasury of the State, on the 1st day of November, 1870, and on the 1st day of May and November in each year thereafter, of six months' interest, and one per cent. towards a sinking fund, upon

> "*the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870.*"

The case turns upon what was due upon the 1st day of May, 1870. The railroads have contended that the amount due upon that date could only be computed by taking the account as it stood upon the books of the State on that day and giving them credit for the treasury warrants surrendered to and canceled by the State under the terms of the Acts of 1861, 1863 and 1864.

The officers of the State have claimed that the proper construction of the Act of August 13, 1870, required them to insist that the amount due upon the 1st day of May, 1870, upon the school-fund loans, could only be arrived at by canceling and disregarding the credit given to the railroads upon the surrender of the treasury warrants and when the railroads tendered their first payment under the Act of August 13, 1870, on the 1st of November, 1870, the Comptroller of the State of Texas, with the concurrence and approval of the Governor thereof, contended that the amount offered by the railroads, which was computed upon the theory that they were entitled to credit for the treasury warrants paid by them was wrong and that the six per cent. interest and one per cent. sinking fund to be paid under the Act of August 13, 1870, should be computed by

disregarding entirely the credit given to the railroads for the treasury warrants paid to the State under the provisions of the Acts of 1861, 1863 and 1864.

This latter construction was, therefore, placed upon this law by the executive officers of the State of Texas, and has now been approved by the highest Court of the State.

Just when the Comptroller with the approval of the Governor and Attorney-General of the State of Texas restated the accounts between the railroads and the State does not clearly appear from the record. The Judge who delivered the opinion of the trial Court has said that "it must be assumed that the accounts were restated and the railroads recharged with the payments made in treasury warrants on May 1, 1870, as that is the date of the entries on the books, and as there is no other evidence of the date of restating these accounts. Hence, the acts mentioned may have referred to the condition of the accounts after they were restated" (Record, p. 68), and has actually found, as a conclusion of fact,

> "that said payments in treasury warrants were charged off the account, and the account of the State with the defendant

railroad company was restated May 1, 1870, so as to ignore said payments in treasury warrants" (Record, p. 71).

Although the record is somewhat obscure upon this point, and even if it is not plain that this finding of the trial Judge is based upon the evidence, yet it is conceded that on November 1, 1870, when the railroads tendered their first payment under the Act of August 13, 1870, the Comptroller, with the approval of the other officers of the State, then in effect restated the account between the railroads and the State, wiped out the credit acquired by the railroads upon the payment of the treasury warrants, recharged them with the amount of the treasury warrants surrendered to the State under the Acts of 1861, 1863 and 1864, and insisted that the interest and sinking fund to be paid under the Act of August 13, 1870, should be paid upon the amount due from the railroads on May 1, 1870, calculated by disregarding such payments in treasury warrants.

Our position is that whether the accounts between the railroads and the State of Texas were actually restated on May 1, 1870, prior to the passage of the Act of August 13, 1870, or subse-

quent to the passage of such act and when the first payment was to be made thereunder on November 1, 1870, the law of August 13, 1870, as construed by the executive officers and the Courts of the State of Texas, clearly and obviously impairs the obligation of the contract between the State of Texas and the railroad companies, which arose under the Laws of 1861, 1863 and 1864.

If this Court should agree with the trial Court that the accounts between the railroads and the State of Texas were restated by the Comptroller on May 1, 1870, so as to cancel and exclude the payments made by the railroads in treasury warrants, and that the law of August 13, 1870, referred to the accounts as thus restated, then this law certainly ratified such act of the Comptroller and thereby impaired the obligation of the executed contract between the State and the railroads arising under the laws of 1861, 1863 and 1864.

If, however, this Court should conclude that the restatement of the account as of May 1, 1870, in effect, took place when the first payment was made by the railroads under the Act of August 13, 1870—viz., on November 1, 1870—and the Comptroller insisted that the amount of interest and

sinking fund due must be computed upon the basis of canceling and disregarding the payments made by the railroads in treasury warrants, then such cancellation by the State officers was done in pursuance of the law of August 13, 1870, and such construction of the duty imposed by the law placed thereon by the State officers and sustained by the State Court resulted in the impairment of the obligation of the contract between the State and the railroads.

The Legislature evidently intended to fix the basis for future payments by the act under discussion. It was passed August 13, 1870, and the first payment thereunder was required to be made on the first of November, following. The basis fixed was the aggregate amount of principal and interest as it stood May 1, 1870. If this aggregate had been held to be the balance, by allowing the payment in warrants, the State could not have prevailed, because it is conceded by the State's counsel that subsequent payments have been sufficient to extinguish a balance thus arrived at. If, however, the balance is to be reached by ignoring the payments in warrants, then the indebtedness sued for exists if the Act of August 13, 1870, which fixed that balance, is valid.

Suppose the act had actually specified the balance as being $657,324.35, due by the Houston and Texas Central Railway Company, and $103,840.01, due by the Washington County Railway Company, as claimed by the State in its petition (Record, p. 3), eliminating the payment in warrants. Suppose, further, that the State had then sued for such balance as named in the act. We apprehend that it then would not have been seriously denied that the act sought to impair the contract arising under the legislation of 1861–1863–1864, by virtue of which the payments were made, in that it repudiated the previous acts and everything done under them and sought to deprive the railway companies of the fruits of the contract. The result is precisely the same. The State sued for the balance fixed by that act. Judgment was rendered in its favor for that balance arrived at by excluding the payments in warrants. Therefore, according to the judgment the balance fixed by the act excluded said payments, for it is the balance under that act that the State sued for. It follows, therefore, inevitably, that, however its reasons were expressed the effect, and the result of the judgment was to give effect to the Act of

August 13, 1870, as impairing the contract arising under the Acts of 1861-1863-1864.

It must be remembered that this was a closed and executed transaction. Everything had been done by the railroads which was necessary to be performed by them in order to constitute a complete and perfect acceptance of the offer of the State of Texas. The warrants had been received by them at par instead of their actual market value in return for transportation, and the warrants had been surrendered to the State in pursuance of its offer and the State had received them, canceled them and given the railroads credit upon its books for the amount thereof.

The contract was therefore completed and executed, and the obligation of the contract upon the part of both parties was to see that the rights which had vested thereunder should not in any way be violated. The State's duty under such executed contract was not to deprive the railroads of the credit given to them upon the books of the State, when they surrendered the treasury warrants in pursuance of the laws of 1861, 1863 and 1864, and an implied contract that it would not do so arose immediately upon

the completion of the original transaction between them, and it would seem to require no argument to show that any subsequent law which did deprive the railroads of such credit, whether by its terms or by the construction put thereon by the executive and judicial department of the State, impaired the obligation of such contract.

It was long since decided in the case of Fletcher vs. Peck., 6 Cr., 87, that the provision of the Constitution forbidding a State from passing a law impairing the obligation of a contract applied to an executed contract as well as to an executory contract, and such is the law to-day.

The Fletcher suit was instituted upon the covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others in the year 1795 from the State of Georgia, the contract for which was made in the form of a bill passed by the Legislature of the State. The fourth covenant of the deed was that the title to the premises had been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent Legislature of the State of Georgia. The

third count in the declaration alleged that a subsequent Legislature of the State of Georgia passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void and asserting the title of the State to the lands it contained. It appeared that the lands in controversy vested absolutely in James Gunn and others, the original grantees, by conveyance of the Governor made in pursuance of an Act of Assembly to which the Legislature was fully competent. This Court held that the original contract of the State arising under its grant to James Gunn was a completed, executed contract, which under the Constitution could not be impaired by any subsequent act of the Legislature repealing such grant. The decision of the Court was delivered by Chief-Justice MARSHALL, who said at page 135:

> "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. * * *
>
> "The Constitution of the United States

declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

"Does the case now under consideration come within this prohibitory section of the Constitution.

"In considering this very interesting question, we immediately ask ourselves: What is a contract? Is a grant a contract?

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

"Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be con-

strued to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected. * * * *

"It is, then, the unanimous opinion of the Court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

In Von Hoffman vs. City of Quincy, 4 Wall., 535, Mr. Justice SWAYNE, in speaking of the case of Fletcher vs. Peck (*supra*), said at page 549:

"The case of Fletcher vs. Peck was the first one in this court in which this important provision [clause as to impairing the

> obligation of contracts] came under consideration. It was held that it applied to all contracts, executed and executory, 'whoever may be parties to them.'"

It would seem, therefore, that the law of August 13, 1870, as it has been construed by the executive officers of the State of Texas and by its Courts, has impaired the obligation of the contract between the State and the railroads in that it has taken from the railroads their vested rights in the credit given them by the State at the time of the surrender of the treasury warrants in question. To take away by an Act of the Legislature rights acquired under an executed contract is to impair by such law the obligation of the contract, or, in other words, to impair the obligation of the implied contract not to disturb rights vested under the completed contract, which implied contract arises as soon as the original contract is executed and closed.

FIFTH POINT.

If the entire transaction between the State of Texas and the railroads arising under the Laws of 1861, 1863 and 1864 is illegal and void because of the unconstitutionality of the consideration of the contract, then the maxim "In pari delicto potior est conditio defendentis" applies, and the Court will leave the parties as it finds them.

The position of the counsel for the State is that the treasury warrants paid by the railroads in pursuance of the offer contained in the Acts of 1861, 1863 and 1864 constituted an illegal consideration for the contract, and that, in consequence, there must be deemed to be no contract between the State and the railroads arising from the transactions between them.

In answer to this proposition, we insist that, if the treasury warrants are unconstitutional, and if, therefore, the consideration of the contract is illegal, then, it being an executed contract, the parties must stand by it and can get no relief.

I.

The doctrine, as we understand it, is that, if anything remains to be done by either party to an illegal transaction, the courts will not enforce such performance; but, if the illegal agreement has been entirely performed, the law will grant no relief to either party thereto. If, in the present case, the railroads had surrendered the treasury warrants to the State, and the officers of the State had declined to give them credit therefor upon the school-fund loan, the courts (conceding the warrants to have been illegal) would not have entertained any proceeding to compel the officers of the State to fulfill the contract arising under the Laws of 1861, 1863 and 1864, but would have left the situation as it was presented to them.

The question, however, which now arises, is whether a Court will allow a completed and executed contract to be set aside and considered null and void simply because it is discovered and claimed by one of the parties thereto, after the whole matter has been closed, that the consideration of the contract is illegal and void.

It will be well to examine again the facts in this case and see just what the situation here is.

The State of Texas made an offer to the railroads that if they would receive its treasury warrants at par for the transportation of freight and passengers over their lines it would receive such treasury warrants at par on account of the money due from the railroads to the State by reason of the school-fund loans. The railroads accepted the offer and did receive the State's treasury warrants at par in return for the transportation of freight and passengers over their lines. After the railroads had accumulated a number of such treasury warrants they surrendered them to the State in pursuance of the State's offer and the State accepted them, canceled them and gave the railroads credit for them upon the school-fund-loan account, and the transaction was completed and closed. Now, if there was anything illegal about it, the State was as much concerned in it as the railroads, if not more so. If the treasury warrants were issued in violation of law it was the State which issued them and not the railroads, and the innocent party in this matter is, surely, the railroads which had nothing to do with the issue of the warrants, and which had given therefor the use of their railroads for about one-tenth of the rates allowed by law, in

pursuance of the offer made by the State. It was the State which took the affirmative and made the offer. The railroads merely complied therewith.

If there was any degree of wrongdoing in the matter, the railroads certainly were the least at fault. But the law in such a case as this does not consider the question of degree, but simply declares that, if the transaction is in fact illegal, the parties are considered as being in *pari delicto* and are left as the law finds them. If the contract is executory, the Courts will not enforce it. If the contract is executed, the Courts will not relieve either of the parties thereto.

To permit the State to cancel the credit given by it to the railroads at the time of the surrender of the treasury warrants in question upon the ground that there was no contract between the railroads and the State, inasmuch as the consideration therefor was illegal, would be in effect to give relief to one of the parties to an illegal transaction at the expense of the other.

This is not, as we understand it, the policy of the law, and the established doctrine that in an executed illegal transaction "*potior est conditio defendentis*" applies as well to a litigation in-

stituted by a State as to one brought by an individual.

The rule was stated in Hill *et al.* vs. Freeman, 73 Ala., 200, 201, in the following language :

> "We understand it to be a first principle, not now to be assailed or even doubted, that where a contract based on a consideration contrary to law, immoral or opposed to public policy, has been fully and voluntarily executed, if the parties are in *pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other. The result is the same as if the contract had originally been legal and valid, and neither can recover the consideration which he has thus voluntarily parted with."

Hutchins vs. Weldin, 114 Ind., 80, was an action of replevin. The defense was that the contract between the parties was executed, and as it was *contra bonos mores* the plaintiff could not recover. It was so held by the Court, and it was said at page 82 :

> " It cannot be denied that there was evidence before the jury which, if believed, authorized them to find that the plaintiff herein, by an executed contract of his own seeking and making, had parted with his title to and right to the possession of the mare in controversy. * * *

"We need not state what this contract was, as shown by the evidence, further than to say that it was fully executed by both the parties thereto, and plaintiff got all the consideration for the mare he bargained for. But the contract was *contra bonos mores* and void as against public policy. * * *

"Upon this point the Court, of its own motion, charged the jury in effect that, if they believed from the evidence that such contract was executed by the delivery of the mare to Whetstone after he had complied with the terms of plaintiff's proposal, the 'law in such a case will leave the parties just where it finds them. * * * If the contract has not been executed, it will not be enforced; if it has been executed, the law will not extend relief.' Where a contract, void as against sound morals or public policy, has been fully executed by both parties, and suit brought under, upon or against such contract '*potior est conditio defendentis.*'"

In Davis vs. Leonard, 69 Ind. 213, it was said at page 217:

"The agreement entered into between the plaintiff and defendant was a wager, nothing more and nothing less, upon the result of an election, and as such was void, as being in contravention of a penal statute, as well as against public policy. * * *

> " By his delivery of the wager to the defendant and his subsequent acquiescence in the mode of payment for it contingently provided by the defendant, the wager became an executed one on the part of the plaintiff. In such a case the law affords no relief. It leaves the parties where it finds them. In an effort to obtain relief under or upon a wagering contract '*potior est conditio defendentis.*' "

In Raguet vs. Roll, 7 Ohio, Pt. II., page 70, the plaintiff brought an action of ejectment, and upon the trial gave in evidence two mortgages executed by the defendant to him for $500 each. The defendant showed that the mortgages were executed by him to secure the payment of $1,000 in consideration of the plaintiff's agreeing not to prosecute the son of defendant for a theft. It was held that the plaintiff was entitled to recover upon the ground that the mortgages were in reality an actual payment of the debts, as well as an actual transfer of the land; and, when a conveyance has actually been executed on an unlawful consideration, the Court will not merely not annul it, they will not even. In the course of the opinion the Court said at page 71:

> " The distinction between an executed and executory contract, where the considera-

tion is unlawful, is a very plain one. In the former case the Court will not annul; in the latter they will not enforce, and this course, so totally opposite in the two cases, is intended to be subservient to the same end, the prevention of an immoral act."

The same principle was well stated in the case of Roll vs. Raguet, 4 Ohio, 400, 419, as follows:

> "Whenever an agreement appears to be illegal, immoral or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed, the Court will not rescind it; if executory, the Court will not aid in its execution."

The doctrine of the cases cited from the State Courts was recognized by this Court in Brown vs. Tarkington, 3 Wall., 377, 381, where it was said:

> "The illegality of the charter of the bank and of the organization under it, as well as the business of banking conducted through its means, were matters not in controversy upon the evidence. The only material question open was whether or not the plaintiff was *particeps criminis*. If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him. If either has sustained loss by the bad faith of his associates, it is but a just punishment for the illegal adventure."

It would seem, therefore, that if the contention as to the illegality of this contract is successfully sustained by the counsel for the State of Texas, they are then met by the equally difficult proposition, to which we see no answer, that the State was in equal fault with the railroads, and that, therefore, the illegal contract being an executed one, the law will leave the parties thereto as it finds them.

II.

There is another aspect of this case which seems to us most important. Upon the execution of the contract between the State of Texas and the railroads there arose an implied contract that neither party should in any way deprive the other of the rights arising from such executed contract. This implied contract is the contract impaired by the Act of August 13, 1870, and our contention is that, even if it should be conceded that the original executed contract was illegal, such illegality in no way taints or affects the implied contract arising upon the completion and execution of the contract arising upon the Acts of 1861, 1863 and 1864. That is to say, there is nothing illegal about the implied contract not to

interfere with or deprive each other of the right which accrued and became vested upon the surrender of the treasury warrants, their cancellation and the credit given therefor by the State upon its books on account of the school-fund loan to the railroads. In other words, though a contract may be illegal and unenforceable, yet any collateral contract, or any contract arising indirectly from such illegal contract, is perfectly good and unaffected by the illegality of the original transaction.

In Planters' Bank vs. Union Bank, 16 Wall., 483, it appeared that at the outbreak of the Rebellion the Planters' Bank of Tennessee remitted to the Union Bank of Louisiana large sums of Confederate treasury notes, some drafts and other claims for collection and a few Confederate bonds for sale. It was understood that the drafts and claims and Confederate bonds were payable only in such Confederate currency. Thereafter and about the 1st of May, 1862, New Orleans was captured by the Government forces, and in August, 1863, General Banks issued an order requiring the banks in New Orleans to pay over without delay to the chief quartermaster of the army all money in their possession standing

upon their books to the credit of any corporation in hostility to the United States. Under this order the Union Bank paid the acting quartermaster the balance standing upon its books to the credit of the Planters' Bank. The payment was made in Confederate notes, and the quartermaster accepted them in discharge of the balance.

Thereafter and on the 15th of September, 1863, the Planters' Bank drew upon the Union Bank for $86,646, the sum in *Federal* money which it conceived to be due it. The Union Bank refused to pay, alleging the seizure by General Banks and payment over accordingly. Thereafter and on the 11th day of September, 1866, the Planters' Bank sued the Union Bank in the Court below to recover the balance claimed to be due it. The defendant upon the trial requested the Court to charge in effect that no valid obligation can arise from the sale of Confederate bonds and securities. The Court declined to so charge, and the plaintiff obtained judgment for the amount of its claim. The case was brought to this Court by writ of error and the judgment of the Court below was affirmed. Mr. Justice STRONG delivered the opinion of the Court, and at page 499 said:

"The only relevant question presented by the point was whether Confederate treasury notes had and received by the defendants for the use of the plaintiffs were a sufficient consideration for a promise, express or implied, to pay anything. After the decision in Thorington vs. Smith the point could not [but] have been affirmed. A promise to pay in Confederate notes, in consideration of the receipt of such notes and of drafts payable by them, cannot be considered a *nudum bactum* or an illegal contract.

"Nor should the Court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs, and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants, on any engagement made by them to sell. Such a contract would have been illegal. *But when the illegal transaction has been consummated; when no Court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different.* The Court is there not asked to enforce an illegal contract. The

plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the Court will not unravel the transaction to discover its origin."

In Brooks vs. Martin, 2 Wall., 70, it was held that:

"After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms—the results of the contemplated operation completed—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract" (Syllabus).

As was said by Mr. Justice MILLER at page 80:

"The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the Court in this case."

If, therefore, the transaction between the State of Texas and the railroads was illegal because of

the character of the treasury warrants surrendered by the railroads to the State, yet it would seem :

(1) That the State was in *pari delicto* and could not be relieved from the effect of the completed transaction between them.

(2) That, even if the original contract was illegal, yet such illegality did not affect the implied contract resulting therefrom.

The railroad companies gave the use of their lines for one-tenth of the rates allowed by law and then surrendered to the State treasury warrants which could have been otherwise disposed of for at least one-tenth of their face value. All this was done by the railroads in pursuance of the offer made to them by the State. To allow the State to escape from its agreement on the ground that what was delivered to it at its request was unconstitutional would certainly not be countenanced in the case of an individual, and we know of no different rule in the case where a State is one of the parties to a completed and executed illegal transaction. To use the words of Mr. Justice SWAYNE in Railroad Co. vs. Durant, 95 U. S., 576, 579 (substituting "State" for "trustee") :

"The position assumed by the *State* in this case is not unlike that of one who, having deprived the owner of the possession of his property, when called to account, civilly or criminally, should insist that the owner's title was fatally tainted with fraud, and that hence the offender had the right to 'take and carry away,' and keep and enjoy, the property himself with impunity.

"The conduct of the appellee, stripped of the verbiage with which it has been surrounded, and viewed in its nakedness, strongly offends the moral sense of the judicial mind."

III.

The State of Texas was not only in *pari delicto* in this case, but it deliberately, by an Act of the Legislature of August 15, 1870, ratified the Acts of 1861, 1863 and 1864, and ratified and confirmed the acts of its public officers done in pursuance of said last-named acts. The full text of the Act of August 15, 1870, will be found at page 22 *et seq.* of the appendix to this brief.

This Act of August 15, 1870, was vetoed by the then Governor of the State of Texas, but notwithstanding such veto was passed by the Legislature in the manner and by the number of votes required by the Constitution in order that

the same should become a law (Rec., p. 15), and by this act the State of Texas expressly recognized and acknowledged the validity of the payments made to it by the railroads in treasury warrants during the war in the following language, to wit:

> "And in making the settlement herein provided for, the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865, by the said company and by the Washington County Railroad Company, upon the accounts on which said sums were respectively paid by said companies."

IV.

No good reason exists why the maxim "*In pari delicto potior est conditio defendentis*," as applied to all others, should not be applicable to the State. On the contrary, its application to the State in this case is enforced by much stronger reasons than support it as against individuals. The State alone issued the warrants in question. It issued them to meet obligations assumed by it. It invited the railroad companies to use the paper. It agreed, in consideration of the acceptance of the paper by the railroad companies at

par, to receive it as it did. It was the ruling power in the community, and all were bound to obey its laws. It accepted the paper—its own paper—without protest, and without objection.

It is wholly beside the question to say that it was not the *State* that engaged in the transaction. It is too well settled by the authorities to admit of serious dispute, that the Government of the State which engaged in the transaction was a lawful government, and the only representative of the State. No one has ever disputed the title of the officers of the State Government during the war, or denied that the Legislatures which sat during the war were lawful. There were no other persons claiming to be such officers, and no other body assuming to be the Legislature of the State of Texas. It is true that the people of Texas were engaged in rebellion against the National Government, but their identity as a State still remained. The Government of the United States never claimed to be the State Government of Texas. It asserted paramount authority, it is true, but it asserted authority as a National and not as a State Government. There were no contestants for the seats of the

legislators, and no other body assuming to exercise the functions of the Legislature; no persons claimed the offices held by the general officers of the State, or assumed to exercise their powers or privileges. The officers of the State, and the Legislature of the State, during the war, represented as nearly the unanimous sentiment of the people of the State as it has ever been represented before or since. Under such circumstances, it seems little short of absurd to say that the Legislature which passed the laws authorizing the payments in question, and the officers of the State executing the transaction, did not represent the State of Texas.

We readily concede that the State is not bound by the act of an officer clearly in excess of power conferred upon him by law, and that an act of the Legislature contrary to the Constitution is not binding for any purpose, and cannot, of course, justify official action based upon it and unauthorized without it. But that is another question, and is wholly apart from this case. No such question arises here. No one can deny, in view of the authorities, that the Legislature by which the acts were passed was a lawful Legislature of this State and the only body au-

thorized or assuming to enact laws for the State. No one can deny that it was authorized, within the limits of legislative power, to speak for the State, or that it was the only body authorized to legislate for the State. No one can deny, with any reason, that the Comptroller who carried out the mandates of the Legislature was the lawful Comptroller of the State, and the only person authorized to exercise, or assuming to exercise, the functions and duties of that office. Upon what reason, then, can it be held that the Legislature, in passing the acts in question, and the Comptroller in executing them, were not acting for and representing the State of Texas, and its only government in fact as well as in law? If the members of the Legislature did not represent the State, who did represent it? Whatever view may be taken of the validity of the transaction upon other grounds, we do insist that it cannot be denied upon any such pretext as that the Legislature authorizing it, and the Comptroller conducting it, were not representing the State.

V.

In this connection it is proper to consider the question of the effect which the war between the

States had upon the powers of the individual States seceding, and the effect of legislation and official action during that period. The question has most frequently arisen in cases where it was charged that certain acts were in aid of the Rebellion.

Did the seceding States pass out of existence during the war? By "State" we mean, of course, not merely a certain territory with fixed geographical boundaries, but also the organized political community which inhabited that territory, and the government thereof. Did the State of Texas cease to exist during the war? Had it for four years no government, no Legislature, capable of passing any valid laws, no executive or other State officials capable of representing or acting for the State, no judiciary qualified to render valid judgments?

Frequent adjudications of this Court have settled these questions, and there is now little room for doubt or controversy as to the legal status of the seceding States, and of the quasi-revolutionary governments which existed in them during the war. It is now familiar and settled law that the union between the States forming the United States was not only an inde-

structible union, but it was a union of indestructible States; that, although the ordinance of secession passed by the individual States was treasonable, null and void, it did not destroy the existence or autonomy of the States which passed it; that, while the governments of those States in rebellion were in some degree revolutionary and unlawful, still they were the only governments, they were the actual *de facto* governments, and the acts of the various departments thereof are valid and binding, *unless* shown to be in violation of some provision of the Constitution of the United States or of the State, at the date of secession, or unless shown to be in aid of the Rebellion (*Johnson vs. Atlantic, etc., Co.*, 156 U. S. 618; *Huntington vs. Texas*, 16 Wall., 402). We call attention to the case of *Davis vs. Gray*, 16 Wall., p. 225, where acts of the Legislature of Texas, passed during the war and giving new life and force to land grants in aid of railroads, were declared to be valid and binding laws; and to the same ruling in *Railroad Co. vs. Kuechler*, 36 Texas, 382; and, also, to *Huntington vs. Texas*, *supra*, where legislation during the war, authorizing the disposal of certain United States bonds, was held to be valid and binding

because *plaintiff* failed to *prove* that the particular transaction thereunder was in aid of the war.

The legal character and status of the government of the Confederate States, and the legal character and status during the war of the governments of the individual States who were members of the Confederacy, were essentially different. The government of the Confederate States had no existence prior to the war; it owed its existence to the ordinances of secession and to the acts of a convention, all of which have been declared to be absolute nullities. It had no other functions to perform than those of hostility to the United States. Being the supposed product of null acts, and existing solely for the purpose of destroying the Union, this Court has always denied its power to enact a binding law, and never accorded it the character of even a *de facto* government; and, when it fell, there perished with it all its laws and ordinances. But with the individual States it was wholly different. They existed prior to the secession; the ordinance of secession, null and void as it was, caused no break in the political continuity of their governments, and no change in their internal structure. They had powers and duties

independent and outside of their relations to the Federal Government, which were not affected by the temporary suspension of those relations during the war. These powers and duties, which were unimpaired by the war, extended to all the legitimate functions of purely State governments, and embraced the control of domestic concerns, matters to which the power of the Central Government did not extend. Hence, the existing State governments during the war were clothed, *ex necessitate rei*, if for no other reason, with full power of legislation and administration *quoad* the purely domestic concerns of the State, and this included the enactment of such financial measures as were within the domain of ordinary legislation (*Williams vs. Bruffy*, 96 U. S., 176, 192; *Horn vs. Lockhart*, 17 Wall., 570; and authorities already cited).

We briefly repeat that if the transaction between the State of Texas and the railroads was illegal:

(1) The State was in *pari delicto* and could not be relieved from the effect thereof.

(2) The illegality of the original transaction did not affect the implied contract resulting therefrom.

(3) The State of Texas expressly ratified by the Act of August 15, 1870, the credit given by it to the railroads for the treasury warrants surrendered by them during the war.

SIXTH POINT.

If the construction put upon the Act of August 13, 1870, by the executive and judicial departments of the State of Texas is the proper construction of such act, and if such construction does not make the act one which impairs the obligation of the contract between the State of Texas and the railroads arising under the Acts of 1861, 1863 and 1864, then such act is void and unconstitutional upon the ground that it deprived the railroads of their property without due process of law.

It is conceded that the State of Texas did give the railroads credit upon its books for the amount of the treasury warrants. The right to this credit was the result and outcome of the completed and executed contract between the railroads and the State and was a right vested in the railroads.

It is now settled beyond controversy that a railroad corporation is a person within the meaning of the Fourteenth Amendment of the Constitution, declaring that no State shall deprive any person of property without due process of law.

Smyth vs. Ames, 169 U. S., 466, 526.
Covington, &c., Turnpike Co. vs. Sandford, 164 U. S., 578.

It is, of course, unnecessary to argue that the credit given the railroads upon the books of the State was property, and that to arbitrarily cancel and discharge such credit without giving the railroads an opportunity to be heard upon the question was a depriving of the railroads of their property without due process of law, and contrary to the Fourteenth Amendment to the Constitution, which enacts that no State shall " deprive any person of life, liberty or property without due process of law."

In Osborn vs. Nicholson, 13 Wall., 654, the plaintiff brought suit upon a note dated March 26, 1861. The defendants pleaded that the note was given in consideration of the sale of a certain negro slave for life, and that the said negro was liberated by the United States Government

on the 1st day of January, 1862. The plaintiff demurred. The Court overruled the demurrer, and, the plaintiff electing to stand by it, gave judgment for the defendants. The case was then brought to this Court by writ of error, and it was decided that the demurrer was good. Among other grounds, it was expressly held that the plaintiff, by his contract with the defendants for the sale of this slave, which was a valid contract at the time it was entered into, had acquired a vested right to the money due him under his contract, and that such vested right could not be taken from him by the Thirteenth Amendment of the Constitution relating to slavery, and that to so hold would in effect be depriving the plaintiff of his property without due process of law. The Court, speaking through Mr. Justice SWAYNE, said, at page 662 :

> " But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that, when the Thirteenth Amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist

afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to 'the general principles of law and reason,' and to one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. *The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be 'without due process of law.'* This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation."

In Chicago, &c., Railway Co. vs. Minnesota, 134 U. S., 418, an act of the Legislature of Min-

nesota establishing a railroad and warehouse commission was interpreted by the Supreme Court of that State as providing that the rates charged for the transportation of property recommended and published by the commission should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates and no opportunity given to the railroad companies to show what rates would be reasonable or unreasonable. It was held by this Court that, if such was the proper construction of the act, then the act was in violation of the Constitution in that it deprived the railroads of their property without due process of law. At page 457 of his opinion Mr. Justice BLATCHFORD, speaking for the Court, said :

> " Under Section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to ' find ' that any part thereof is in any respect unequal or

unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission 'shall declare to be equal and reasonable,' and to that end it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission; in fact, nothing which has the semblance of due process of law. * * *

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property; and thus, in substance and effect, of the property itself without due process of law and in violation of the Constitution of the United States."

Mr. Justice MILLER, who wrote a separate

opinion concurring in the judgment of the Court, said, at page 461 :

> " But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a Court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void."

The Statute of August 13, 1870, as construed by the highest Court of Texas, also deprives the railroads of their property without due process of law in this: that it takes from them the credit given them by the State in its school-fund-loan account without giving them any due or just compensation therefor.

" The construction so given to the statute by the highest Court of the State must be accepted by this Court in judging whether the statute

conforms to the Constitution of the United States" (Missouri Pacific Railway Company vs. Nebraska, 164 U. S., 403, 414), and when the Court of Texas found in this case that in pursuance of the Act of August 13, 1870, "the payment in treasury warrants were charged off the account, and the account of the State with the defendant railway company was restated May 1, 1870, so as to ignore said payments in treasury warrants" (Rec., p. 71), the Act of August 13, 1870, was construed by such Court as taking away from the railroads these credits and giving them nothing in return. That is to say, the railroads were deprived of their vested contract rights without any compensation therefor, and it is well settled by this Court that any law which deprives a person of his property without compensation is in violation of the clause of the Fourteenth Amendment which declares that no State shall deprive a person of his property without due process of law.

It has been decided many times by this Court that a State cannot require railroad companies to carry passengers and freight without reward or for less than a reasonable compensation or rate, and that any legislation attempting to reach such

a result would be obnoxious to the objection that it deprived the companies of their property without due process of law, in that it would amount to taking their property without due compensation.

Railroad Commission Cases, 116 U. S., 307, 331.
Dow vs. Beidelman, 125 U. S., 680, 689.
Georgia Rd. & Banking Co. vs. Smith, 128 U. S., 174, 179.
Chicago, Milwaukee & St. Paul Railway vs. Minnesota, 134 U. S., 418, 458.
Chicago & Grand Trunk Rway. vs. Wellman, 143 U. S., 339, 344.
Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362, 399.
St. Louis & San Francisco Railway vs. Gill, 156 U. S., 649, 657.
Covington & Lexington Turnpike Road Co. vs. Sandford, 164 U. S., 578, 584, 594–5, 597.

In Chicago, Burlington, &c., Railroad vs. Chicago, 166 U. S., 226, the question was expressly decided, and Mr. Justice HARLAN, speaking for the Court, said at page 236:

> " Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, there-

fore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. * * *

"In our opinion, a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest Court of the State is a denial by that State of a right secured to the owner by that instrument."

In Smyth vs. Ames, 169 U. S., 466, it was held that the effect of an Act of the Nebraska Legislature, which prescribed rates for the transportation of freight entirely within the State boundaries, was to deprive the railroads of their property without due process of law, in that such companies were required to carry freight without exacting charges which yielded a reasonable compensation for such service, and the act was condemned as unconstitutional. It was declared by the Court at page 526 as settled law that:

"While rates for the transportation of persons and property within the limits of a

> State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter may not become the subject of judicial inquiry."

We do not know that the character of the property of a railroad company which is taken by a State without compensation in any way affects the application of the constitutional provision, and, so far as we can understand, there is no difference between taking the transportation facilities of a railroad without compensation and taking any other part of its property without compensation, as, for instance, in this case the credit given to the railroads, and standing upon the books of the State, which was entered in the account between the railroads and the State at the time of the surrender to the latter of the treasury warrants in question in this suit.

Under this Law of August 13, 1870, without notice and without compensation, the credit which had been theirs since 1864 is suddenly taken from the railroads and transferred to the other

side of the account. For years the State had been the debtor of the railroads for this large amount credited to the railroads, and in a moment, without notice and without compensation, the situation of the parties is suddenly reversed, and the State becomes a creditor of the railroads for the amounts as to which it had previously admitted payment. In other words, the credit on the books of the State, which was the property of the railroads, was taken from them and nothing given to them in compensation therefor.

It would, therefore, seem that the Act of August 13, 1870, violates in two respects the constitutional provision declaring that a State shall not deprive a person of his property without due process of law.

FIRST. It has taken away from the railroads the credit given them upon the books of the State without an opportunity to be heard.

SECOND. When the credit in favor of the railroads was taken by the State, transferred to the other side of the account and changed into a debit, no compensation therefor was given to the railroads.

Even if there were no Fourteenth Amendment to the Federal Constitution it is not at all clear

that a State which has created by legislation vested rights in its citizens can by subsequent legislation deprive them of such rights. This Court at least has never seemed of the opinion that such power resided in the Legislature of a State.

In Terrett vs. Taylor, 9 Cr., 43, 50, Mr. Justice STORY said:

> "If the Legislature possessed the authority to make such a grant and confirmation, it is very clear, to our minds, that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito.* Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

In Wilkinson vs. Leland, 2 Pet., 627, 657, Mr. Justice STORY delivered the opinion of the Court, as follows:

> "In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate

in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away *without trial, without notice and without offense.* Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be left sacred. At least, no Court of Justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention."

In Calder vs. Bull, 3 Dallas, 386, 394, it was said:

> "It is not to be presumed that the Federal or State Legislatures will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community *and on making full satisfaction.* The restraint against making any *ex post facto* laws was not considered by the framers of the Constitution as extending to prohibit the depriving a citizen even of a vested right to property: or the provision '*that private property should not be taken for public use without just compensation*' was unnecessary."

In the case of Steamship Company vs. Joliffe, 2 Wall., 450–457, it was said by Mr. Justice FIELD:

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the parties asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

The doctrine of the cases cited would seem to be that, independently of the provisions of the Fourteenth Amendment of the United States Constitution, vested rights granted by a Legislature cannot be revoked by a subsequent Legislature.

RECAPITULATION.

We briefly repeat the main propositions, exclusive of the removal question, presented to the Court in this case :

FIRST. It is for this Court to determine whether there was a contract between the State of Texas and the railroads.

SECOND. The Laws of 1861, 1863 and 1864, and the proof contained in the record of what was done by the railroads thereunder, and the acts of the State officers in canceling the treasury warrants surrendered by the railroads, establish a *prima facie* case of an executed contract between the State and the railroads, and there is no evidence in the record which in any way invalidates such contract.

THIRD. The obligation of the executed contract between the State and the railroads was impaired by the Act of August 13, 1870, inasmuch as the construction placed thereon by the executive officers of the State and sustained by the Court below took from the railroads the rights which had vested in the railroads under the contract—viz., the credit given to the railroads upon the books of the State at the time the treasury warrants were surrendered.

FOURTH. Even if the contract between the State of Texas and the railroads, arising under the laws of 1861, 1863 and 1864, is illegal, it is a completed transaction, and the Courts will give neither party relief therefrom under the maxim "*In pari delicto potior est conditio defendentis.*"

FIFTH. The Act of August 13, 1870, violates the provisions of the Fourteenth Amendment to the United States Constitution in that the construction placed thereon by the officers of the State of Texas and by the Court below deprives the railroads of their property—viz., the credit given them upon the books of the State, without due process of law.

SEVENTH POINT.

The judgment of the Court below should be reversed.

JOHN G. CARLISLE,
R. S. LOVETT,
J. P. BLAIR,
MAXWELL EVARTS,
Of Counsel for Plaintiffs in Error.

Appendix to Brief

CONTAINING

All the Acts of the Texas Legislature Referred To in the Brief and Not There Cited at Length.

CHAPTER II.

An Act accepting the propositions made by the United States to the State of Texas, in an Act of the Congress of the United States, approved the 9th day of September, A. D. 1850, entitled "An Act proposing to the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of all territory claimed by her, exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico."

WHEREAS, said propositions are contained in the first section of said act, in the following words, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States and upon the State of Texas: Provided, the said agreement by the said General Assembly shall be given on or before the 1st day of December, eighteen hundred and fifty.

FIRST. The State of Texas will agree that her boundaries on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico.

SECOND. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

THIRD. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

FOURTH. The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars in stock bearing five per cent. interest and redeemable at the end of fourteen years, the interest payable half-yearly at the Treasury of the United States.

FIFTH. Immediately after the President of the United States shall have been furnished with an authentic copy of the Act of the General Assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article in this agreement: *Provided, also*, that no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the Treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States; *provided*, that nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise."

THEREFORE, 1st, Be it enacted by the Legislature of the State of Texas, That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared

that the said State shall be bound by the terms thereof, according to their true import and meaning.

2d. That the Governor of the State be, and he is hereby, requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress, and that this act take effect from and after its passage.

Approved November 25, 1850 (Vol. III., Part IV., p. 4, Laws of Texas, 1850).

CHAPTER XVIII.

An Act to establish a system of schools.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the sum of two millions of dollars of the five per cent. bonds of the United States, now remaining in the Treasury of the State, be set apart as a school fund, for the support and maintenance of public schools, which shall be called the Special School Fund, and the interest arising therefrom shall be apportioned and distributed for the support of schools as herein provided.

SEC. 2. That the Chief-Justice and County Commissioners shall constitute a Board of School Commissioners for each county, whose duty it shall be, during the year eighteen hundred and fifty-four, to form their respective counties into school districts of convenient size, and number the same, so that each district in a county shall be known by its appropriate number. Provided, however, that in forming said districts, the convenience of neighborhoods shall be regarded as much as possible and each school district shall contain a sufficient number of children for the maintenance of a school. They shall also, at the same time, order an election by the qualified voters of each school district, for three Trustees for each district, giving ten days' notice of said election by posting up advertisements of the same at one public place, at least, in each district, stating fully the time and places of holding and the object of said election.

SEC. 3. It shall be the duty of the Chief-Justice to appoint a suitable person in each district to preside at the election in his district, who shall make his returns within ten days to the Chief-Justice of the county, and the said elections shall in all other respects be governed by the laws regulating elections.

SEC. 4. The District Trustees so elected shall select from their number a chairman, who shall, whenever it may be deemed necessary, call a meeting of the Trustees,

and preside at their deliberations, and perform such other duties as may hereafter be assigned him.

SEC. 5. That it shall be the duty of the assessor and collector of each county in the State, during the year eighteen hundred and fifty-four, and every year thereafter, to make out a list of all the free white population in his county between the ages of six and sixteen years, particularly designating the number of persons between such ages in each school district, and transmit the same, under his hand and official signature, to the County Clerk of the county, and a certified copy thereof to the Treasurer of the State, on or before the first day of July in each and every year.

SEC. 6. That it shall be the duty of the Clerk of the County Court to file and preserve in his office the election returns and the list aforesaid furnished by the assessor and collector. It shall be the duty of the Treasurer of the State to ascertain, from the abstracts transmitted to him by the assessor and collector, the aggregate population between the ages of six and sixteen years, and so much of the fund appropriated by this act as may be in the treasury shall be apportioned among the different counties in the State according to the number of the population of scholastic age in each county, subject to the order of the County Courts, and payable to the respective County Treasurers, upon the order of such County Court, under the hand of the Chief-Justice and the seal of the Court, or such amount may be placed to the credit of the assessor and collector of taxes of such county, upon his payment into the county treasury of his county the amount so apportioned to such county, and filing the receipt of the County Treasurer, acknowledged by said Treasurer before the Clerk of the County Court, and by the said Clerk duly certified, under his hand and the seal of his Court, with the Treasurer of the State.

SEC. 7. That it shall be the duty of the District Trustees to fix the time and place for holding an election in their respective districts (for the location or selection of school houses within their respective districts), and to

appoint a presiding officer. That the chairman of the Board of Trustees shall cause written notices of said election to be posted up for at least five days next preceding the election, in three public places in each school district. That the returns of said election shall be made within five days to the chairman of the said board, who shall examine the same in presence of his co-Trustees; and a majority of the votes polled in a district shall be necessary to the permanent location of a school house; and no change of the location of a school house thus located shall be made, except by a majority of two-thirds of those voting in such election, taken after due notice as above provided.

SEC. 8. That no money shall be drawn from the county treasury for school purposes in any school district until the people of such district shall have provided a good and substantial school house, with the necessary seats and other fixtures, and that the money appropriated by this act shall be applied only towards the payment of teachers for each school.

SEC. 9. That it shall be the duty of the School Trustees for each district, as early as practicable after their election, by giving due notice, to call a meeting of all the patrons of the school in the district, and a majority of those present shall indicate to the Trustees the length of time during the year they desire a school, the kind of teacher they want, and the amount of salary they are willing to pay. It shall be the duty of said Trustees to observe as far as possible such instructions, to employ teachers of suitable moral character and qualifications, to visit from time to time the district school or schools under their charge, to expel a pupil for misconduct, to examine all complaints between teacher and pupil of a serious character, to discharge a teacher for incapacity or improper conduct, and generally to exercise supervision over the affairs of the school within their district.

SEC. 10. That the teacher of each school shall be required to keep a roll or day book, and at the close of his term of service to furnish said School Trustees with a

tabular statement of the names of all the patrons and pupils of the school, the number of pupils sent by each patron, and the number of days' attendance by each pupil, which statement shall be supported by his affidavit, made before some officer authorized to administer oaths, that the same is true and correct.

SEC. 11. That it shall be the duty of said Trustees, upon receiving the shares of the school fund to which their school district is entitled, to apply the same towards the payment of the teachers' salary, and the remainder of said salary, if any, to apportion equally among the patrons of the school according to the number of pupils and the time sent by each to the school; and, if any such patron should neglect or refuse to pay his share of the salary apportioned as aforesaid, said Trustee may institute suit against him or her for the amount of money due, and the tabular statement furnished them, under oath, by the teacher, and mentioned in the preceding section of this act, shall be *prima facie* evidence of such indebtedness.

SEC. 12. If any patron or patrons of the school are unable to pay their share of the salary apportioned as aforesaid and the said Trustees be satisfied of the fact, it shall be the duty of said Trustees to make out a list of all such patrons in the district, together with the amount of money due from each for tuition, and forward the same under their own proper signatures to the Chief-Justice of the county.

SEC. 13. That the Chief-Justices of each county shall annually furnish the Treasurer of the State with a statement under his hand and seal of the county, of the amount of money due for tuition from all such patrons as are exempt under the preceding section of this act in the county, according to the list returned by the School Trustees. And the Treasurer of the State is hereby authorized and required to pay said amounts of money due from the patrons so exempt, out of the school fund derivable from taxation and created by the Constitution of the State, and he shall distribute the same in manner and

form as provided in the sixth section of this act.

SEC. 14. That the County Treasurer of each county shall give bond with two or more securities, payable to the county in twice the amount of the school fund to which his county shall be entitled, so soon as the Chief-Justice shall be notified by the Treasurer of the State of the amount to which his county is entitled, which bond shall be conditioned that he will well and faithfully keep an account for the money to him committed as a school fund for his county, and pay out the same only upon the order of the Chief-Justice of the county, under his hand and the seal of the County Court. He shall also enter into a bound book to be kept by him for that purpose, all moneys received, all moneys paid out, and to whom and when paid, and register and number all orders by him paid or accepted to be paid, which book, together with such orders, shall be by him exhibited at his annual settlement with the County Court. That after the year eighteen hundred and fifty-four his said bond shall be renewed between the first and tenth of September of each year, that all suits upon such bonds shall be in the name of the county and in other respects they shall be governed by the laws relating to the bonds of County Treasurers.

SEC. 15. That the Trustees of each school district shall be elected annually after the year eighteen hundred and fifty-four on the first Monday in September, in the manner herein provided; that they shall be a body corporate and politic, by the corporate name of the Trustees of Common School, District No. —— (filling the blank with the number of the district), and for the purposes for which they are created may sue and be sued, hold and dispose of property and do such acts and things as are incidental and necessary to the performance of their duties.

SEC. 16. That the Treasurer of the State shall be *ex-officio* Superintendent of Common Schools in this State, and it shall be his duty, immediately after the first day of September in each and every year, to record the abstracts of children of lawful age in the different counties and apportion the moneys as herein contemplated,

distributing to the several counties the amount to which each is entitled, according to its scholastic population, ascertained in the manner herein prescribed and also the amount due for the tuition of children exempt from tuition fees; and it shall further be the duty of the Treasurer of this State to provide the necessary record books, to be by him kept exclusively for recording abstracts as herein contemplated, and keeping a full and perfect account of all investments and moneys belonging or in anywise appertaining to the common-school fund of this State, and all apportionments and distribution of money by him made for common-school purposes; and he shall report to the Governor annually on or before the first day of October the condition of the common-school fund, and also make to each regular session of the Legislature such suggestions in regard to the common-school system as may be deemed advisable; that the fiscal scholastic year shall commence on the first day of September and end on the first day of August in each and every year from and after the first day of September next.

SEC. 17. That it shall be the duty of the Chairman of the Board of Trustees for each school district to present, at least once a year, his application to the Chief-Justice of his county for such amounts of said fund as his district may be entitled to receive, according to the number of children between the ages heretofore prescribed within his district, and also present his application to the Chief-Justice annually for the amount of money due his district for the tuition of children exempt from tuition fees; and the said Chief-Justice having duly informed himself that the same is correct, shall draw upon the County Treasurer an order, under his hand and seal of the County Court, for the amount or amounts so due and demanded.

SEC. 18. That nothing in this act shall prevent the Trustees of any school district, after being instructed by a majority of the patrons of schools in such district, from employing the teacher of a primary department in any

college or academy, and converting such primary department into a common school for such district; and that this act take effect from and after its passage.

Approved January 31, 1854 (Gen. Laws of Texas, 5th Legislature, p. 17).

CHAPTER CIII.

An Act to provide for the investment of the Special School Fund in the bonds of railroad companies incorporated by the State.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the Governor, Comptroller and Attorney-General shall, *ex officio*, constitute a Board of School Commissioners, whose duty it shall be to draw from the treasury the Special School Fund created by the Act of January 31st, 1854, entitled "An Act to establish a system of schools," and such other amount as may hereafter be added to said fund, and invest the same as provided in this act. And said board shall annually report to the Governor its acts and proceedings relative to the said school fund, which shall be laid before the Legislature at each and every session thereof.

SEC. 2. That the five per cent. indemnity bonds belonging to said Special School Fund may and shall be loaned to legally incorporated railroad companies in this State at their current value, including premium, provided said value shall not be less than par, otherwise at par, for the term of ten years from the date of said loans at an interest of six per cent. per annum, payable annually upon the terms and conditions specified in this act, provided that one-half of said fund shall be loaned to companies whose works lie east of the Trinity River, and the residue to companies whose works lie west of said river.

SEC. 3. Said Board of Commissioners is hereby authorized to invest said funds by loaning to any such company which has been chartered for the purpose of building a railroad in this State the sum of six thousand dollars per mile for each and every mile of railroad constructed as hereinafter provided. Said loans to be secured by the bonds of such company for said principal and interest, made and executed to the State of Texas in the corporate name of such company, signed by the president, and countersigned by the secretary or treasurer under

the seal of such company, which bond shall constitute a lien upon the road and charter rights of such company, including the roadbed, right of way, grading, bridges, iron, rails, equipments and masonry, and upon all the stock subscribed for in said companies, all the depots and depot stations and all the property owned by such company as necessary for its business. And the State of Texas upon the execution of said bonds, and by virtue of the same, shall be invested with said lien or mortgage for the payment of said bonds and the interest thereon as the same becomes due, without the necessity of any deed, special contract or act of registration.

SEC. 4. Said Board of Commissioners shall loan said sum of six thousand dollars for every mile of road completed to any such company as shall have completed in a good and substantial manner, and furnished ready for actual use, a continuous section of twenty-five miles of the road of said company, and graded an additional consecutive section of twenty-five miles, ready for the crossties and other superstructures; and the same amount per mile for every additional consecutive section of ten miles which shall be so completed and graded, ready for the ties and other superstructure. And the same amount per mile for every section of ten miles which shall be so completed and furnished ready for use, upon any railroad which shall be a continuation of or connection with any other railroad running from any adjoining State or Territory in the State of Texas; provided such road shall, together with such continuation or connection, be completed at least twenty-five miles in length; and provided that, before said loan is drawn upon any completed section of ten miles, an additional consecutive section of ten miles shall be graded ready for the ties and other superstructure.

SEC. 5. That upon the application of any such railroad company to said Board of Commissioners for said loan, and its representations that Section fourth of this act has been complied with, said Board of Commissioners shall appoint some competent engineer, who shall, at the

expense of the company, examine the road of said company, and make a full report upon the condition of the same under oath, and shall report all matters pertaining to the business of said company which he may deem useful to said Commissioners in ascertaining the true condition of said road and company. And upon being fully satisfied that any section or sections of said road have been constructed and completed, as provided in the fourth section of this act, and that said section or sections are not subject to any lien whatever, other than such as may be created by this act in favor of the State, said Board shall draw a warrant on the Treasury of the State, in the name of said company, against said Special School Fund, for such amount of said bonds as it may be entitled to under the provisions of this act, which warrant shall state on account of what work it is drawn, shall be signed by said Board of Commissioners, and countersigned by the Governor, and delivered to the President or the duly authorized agent of said company.

SEC. 6. That, upon the presentation of such warrant or warrants to the Treasury of the State, the amount of said indemnity bonds called for in the same shall be delivered and transferred according to law to the President or authorized agent of said company, his receipt taken therefor, and the same charged to the Special School Fund.

SEC. 7. That, before said Board shall deliver to said Company said warrant or warrants upon the treasury, it shall require said company to execute and deliver into the treasury the bonds of said company for said loan or loans in sums of not more than one hundred and fifty thousand dollars and not less than fifty thousand dollars each, payable to the State of Texas ten years after date, together with coupon bonds for the six per cent. interest thereon, payable annually, as above stated, which bonds shall be executed in the mode prescribed in the third section of this act, and shall be made payable at the office of the Treasurer of the State, and which shall be a lien in favor of the State, as specified in the third section of this act, and shall have a priority

over all other claims against said company. That, in addition to the annual interest of six per cent., every company accepting any loan under the provisions of this act shall pay annually, at the expiration of each year from the date of the loan, the further sum of two per cent. upon the amount of the loan into the treasury of the State for the purpose of establishing a sinking fund to be applied towards the payment of the loan at its maturity, and the amount so paid for the purpose of such sinking fund, with their accumulations, shall be credited to such railroad.

SEC. 8. And after the execution of said bonds upon said first section, or any subsequent constructed section, it shall not be lawful for said company to give, create or convey to any person or persons, or body corporate whatever, any lien, incumbrance or mortgage of any kind which shall have priority over or come in conflict with the lien herein secured, and any such lien, incumbrance or mortgage shall be null and void as against said lien or mortgage in favor of the State.

SEC. 9. That it shall be the duty of any such company, as the interest becomes due upon said bonds executed as aforesaid, to deposit the same in the treasury of the State, which amount shall be credited to the Special School Fund, and shall be subject to the immediate appropriation for school purposes as provided by law. And all railroad companies shall pay said interest so due by them annually on the first day of March out of the first receipts arising from said road, independent of any expenses or other liabilities of said roads, and the coupon bonds of such companies so satisfied shall be canceled and delivered up.

SEC. 10. Whenever any of the bonds of said company for the principal loaned thereon shall become due, said company shall deposit said sums so due in the treasury of the State, and said bonds when so paid shall be canceled and delivered up, and said principal sums so returned into the treasury shall be credited to the Special School Fund and subject to reinvestment by said board, as provided in this act.

SEC. 11. That, if any such company shall fail or refuse to pay said principal or interest bonds from time to time as the same shall become due, the road of said company, together with all the rights and property of said company specified in Section third of this act, shall be sold or caused to be sold by the Governor of the State for the satisfaction of said bonds so due, as well as the bonds of said company which may have been given under this act to the State, and the whole of said bonds shall be deemed due if said sale takes place, and the proceeds of such sales shall be deposited in the treasury and credited to the Special School Fund.

SEC. 12. That, upon the failure of any such company to pay said principal or interest bonds, as required in this act, it shall be the duty of the Governor, after the expiration of thirty days, to cause notice of the sale of such road, to be advertised in some newspaper published at the seat of government for the term of three months. And after due notice has been given shall cause the entire road, together with all the rights and property of said company specified in the third section of this act, to be sold at public auction to the highest bidder for cash, at the door of the capitol of the State and at the time specified in said advertisement; provided that, if the principal or interest bonds which may have become due before the giving of said notice, and all cost attending said proceedings, shall be paid before the day of sale, then said proceedings for sale shall be stopped.

SEC. 13. In the event of any sale of any railroad under the provisions of this act, it shall be the duty of the Governor, either in person or by agent, to attend such sale and protect the interests of the Special School Fund, and shall, if necessary to protect said interest, buy in said road with all the rights and property belonging to said company, in the name of the Board of School Commissioners; provided, he shall not bid more than the amount of the bonds of said company with the interest due thereon, and the cost and expenses attending said sales. And, in the event of any such purchase in the

name of the Board of School Commissioners, the Governor shall appoint a Receiver, who shall be required to enter into such bonds as may be required by the Governor, and whose duty it shall be to take immediate possession of and to control and manage said road, under direction of the Governor, until otherwise disposed of by law, the said Board of School Commissioners shall retain in the treasury of the State, charged to the credit of the school fund, five per cent. of the United States bonds, of all sums loaned as provided in this act, as a sinking fund, to be used for the "*pro rata*" appropriation annually due to the several counties for school purposes, in the event of the interest due to the school fund after the sale of any railroad shall not be paid by said road.

SEC. 14. The State of Texas expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interest of the Special School Fund in securing the payment of said bonds and in enforcing the lien reserved thereon.

SEC. 15. That the provisions of this act shall not extend to any railroad company which may be entitled to receive from the State a larger grant of land than sixteen sections of six hundred and forty acres to the mile for the construction of such road, nor to any road for more than a single trunk with the necessary turn-outs, nor to any branch road, nor to any road which shall not be commenced and prosecuted as required by the provisions of its charter. Provided, that no company shall be entitled to a loan under this act for any section of road between the Cities of Galveston and Houston, or Galveston and the crossing of Buffalo Bayou near the City of Houston.

SEC. 16. That no railroad which is less than fifty miles in length, according to the terms of its charter, shall be entitled to the benefits of this act, except on the following terms: The Brownsville and Rio Grande Railroad shall be entitled to the benefits of this act on its entire length as soon as it is completed from Point Isabel to Brownsville; and any other railroad which is less than fifty miles in length, according to the terms of its charter,

whenever one-half of its entire length has been completed and put in running order and the other half has been graded ready for the ties and other superstructure, shall be entitled to said loan on said completed section, which shall be expended for the completion of the entire road, and in no event shall said roads be entitled to said loan on more than one-half of its entire length.

SEC. 17. If any person making an affidavit as herein required shall knowingly swear falsely, he, upon conviction thereof before any court of competent jurisdiction, shall suffer all the pains and penalties of perjury.

SEC. 18. That it shall be the duty of any railroad company receiving the benefits of this act to make through its proper officers an annual report under oath, to the Governor, containing a full and complete statement of the affairs of said company together with the receipts, expenditures and liabilities of said companies and with such other facts as may be necessary, under the general laws regulating railroads and said railroad companies.

SEC. 19. That every railroad company, before it shall be entitled to the privileges of this act, shall establish upon the line of its road an office where books shall be kept, showing the state of its stock and general accounts, and where the company may be legally served with all notices and processes ; and the superintendent or principal manager of the transportation business of the road shall reside in this State. And, whenever a majority of the shares in the capital stock of the company shall be owned in this State, a majority of the directors, including the president, shall be residents thereof. And that this act take effect and be in force from and after its passage.

Passed August 13, 1856 (Gen. Laws of Texas, 6th Legislature, Adjourned Session, p. 31).

An Act authorizing treasury warrants to be received in payment of certain dues:

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Comptroller and Treasurer shall receive treasury warrants for money in settlement with any individual indebted to the State for lands under the different pre-emption laws, or laws authorizing the sale of University lands, or laws providing for the sale of the public domain. Provided that the Comptroller and Treasurer shall transfer to the credit of the University and Common School Fund such warrants as may be received in payment for lands appropriated for the University and for common schools, respectively. Which said warrants shall be paid out of any money in the treasury not necessary to pay other appropriations.

SEC. 2. The Board of School Commissioners are hereby authorized to receive treasury warrants in payments of the two per cent. for a sinking fund, payable by railroad companies in whose bonds the Special School Fund has been or may hereafter be invested; and said warrants shall be held for the credit of said Special School Fund in like manner as provided by law for the investment of said sinking fund in State stocks.

SEC. 3. Where treasury warrants are tendered under the provisions of this act in payment of any indebtedness, the interest shall be computed and allowed, and where the warrants exceed the indebtedness the holder shall be entitled to a warrant for the residue.

SEC. 4. That all laws and parts of laws conflicting with the provisions of this act be, and the same are hereby, repealed; and that this act take effect and be in force from and after its passage.

Approved February 9, 1861 (Page 19, Gen. Laws, Extra Session 8th Legislature).

CHAPTER XLVI.

An Act for the relief of certain railroad companies of the State of Texas:

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the payment of all interest and the two per cent. sinking fund due and to become due on the bonds issued by the several railroad companies of the State of Texas, for loans from the Special School Fund, be, and the same is hereby, extended until the 1st day of January, 1864, or until six months after the termination of the present war between the Confederate States and the United States of America, should it terminate before the time above named.

SEC. 2. That this act shall in no wise impair the prior lien which the State now holds upon any railroad for the payment of the loans and interest now due or to become due by such roads to the State.

SEC. 3. That this act take effect and be in force from and after its passage.

Approved January 11, 1862 (Gen. Laws of Texas, 9th Leg., p. 37).

CHAPTER LXIII.

An Act for the relief of railroad companies indebted to the State for loans from the Special School Fund :

WHEREAS, the political disturbances since the year eighteen hundred and sixty, by unsettling the business of the country, have largely contributed to prevent compliance on the part of railroad companies indebted to the State for loans from the Special School Fund, with their engagements respecting the payment of the principal and interest of said loans ; and,

WHEREAS, it is desired to relieve said companies from the liability of their railroads to sale consequent upon their non-compliance as aforesaid, therefore :

SECTION 1. Be it enacted by the Legislature of the State of Texas, that any railroad company indebted to the State for loans from the Special School Fund may avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State, on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment, in addition, on said first day of November of one per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest, and one per cent. on account of said sinking fund semi-annually thereafter ; to wit, on the first day of May and November in each year.

SEC. 2. That if any railroad company shall fail to pay any amount required to be paid in section one of this act at the time designated thereby, or within ten days thereafter, then the whole debt of such company, principal and interest, shall become due, and the Governor shall proceed without delay to cause the railroad of said company and its franchises and property, so far as the lien or

mortgage of the State covers the same, to be sold, the sale to be in all respects (when not in conflict with this act) conducted according to the provisions of the statute of August thirteenth, A. D. 1856; provided, however, that in case the Governor should (for the protection of the School Fund) deem it necessary, he may buy in any road to be sold under this act, in the name of the State; provided, further, that if the whole principal and interest which may have become due as aforesaid, and all costs attending the advertisements and proposed sale, shall be paid before the day of sale, then the proceedings for sale shall be stopped.

SEC. 3. That the State of Texas will not exact of any railroad company not hereafter in default in respect to any of the payments required in this act the payment of the principal of the debt of said company, excepting said payments on account of the sinking fund as aforesaid, but that any company may pay the same in full at any time on thirty days' notice to the Governor, and that said lien or mortgage of the State shall not attach to any extension of its existing road hereafter constructed by any of said companies.

SEC. 4. That this act shall take effect from and after its passage.

Approved August 13, 1870 (Gen. Laws of Texas, 12th Leg., p. 85).

CHAPTER CXLVIII.

An Act for the relief of the Houston and Texas Central Railway Company :

WHEREAS, the Houston and Texas Central Railway Company has become the owner, by purchase, of the Washington County Railroad ; and,

WHEREAS, the Houston and Texas Central Railway Company and the Washington County Railroad Company are indebted to the State of Texas for sums borrowed from the Special School Fund ; and,

WHEREAS, the Houston and Texas Central Railway Company is desirous to extend the Washington County branch to the City of Austin, as soon as it can be done, and to build its main trunk to Red River in the shortest time possible, and also to build a branch road from some point in Navarro County so as to strike Red River at such point as will enable said Company to form a connection with any railroad that may be built southward from Kansas or Missouri to said river ; and,

WHEREAS, the ability of said Company to build said main trunk and branch roads would be greatly increased by the consent of the State to exchange the six per cent. bonds of the said companies, now held by the State, for the seven per cent. gold interest-bearing bonds of the said Houston and Texas Central Railway Company, issued by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Shepherd Knapp and David S. Dodge, of the City of New York, are named (and have accepted), as trustees ; and,

WHEREAS, it is believed that such exchange can be made without in any manner endangering the security of the school fund ; therefore :

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston and Texas Central

Railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of the said railway; and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the "Washington County Railroad" from the Town of Brenham, in the County of Washington, to the City of Austin, in the County of Travis, by the most eligible route to be selected by the engineers of the company; and the said company shall also have the right to build a branch road diverging from the maintrunk at some point in Navarro County and striking Red River at such point as will enable said railway company to make a connection with any railroad which may be built to said river from the northward; and the said Houston and Texas Central Railway Company, by reason of the construction of the said railway from the Town of Brenham to the City of Austin, and by reason of the construction of the said branch from Navarro County to Red River, shall have and enjoy all the rights, privileges, grants and benefits that are now, or may at any time hereafter, be secured to any railroad company in the State of Texas by any general law of the State, and shall be subject in respect of said railway and said branch to all the duties and responsibilities imposed upon said Houston and Texas Central Railway Company by its charter and by other laws of the State.

SEC. 2. For the whole amount of principal and interest due to the State by the Houston and Texas Central Railway Company and the Washington County Railroad Company on the first day of July, A. D. 1870, the Governor of the State shall accept and receive from the Houston and Texas Central Railway Company the seven per cent. land grant sinking fund first mortgage gold interest-bearing bonds of said company, which said bonds, also payable in gold, are issued or to be issued by virtue of a deed of trust executed by the said company on the first day of July, A. D. 1866, and mature on the first of July, A. D. 1891, the interest on which is payable

on the first days of January and July of each year, in which deed of trust Shepherd Knapp and David S. Dodge, of New York, were named and accepted as trustees; and the Governor shall, after making the exchange of bonds herein provided for, cancel and deliver to said railway company the six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railroad Company now held by the State for sums borrowed from the School Fund, and the settlement and exchange of bonds herein provided for shall be made at any time that may be agreed upon by the Governor and the said railway company, between the passage of this act and the first day of December, A. D. 1870; and in making the settlement herein provided for the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865 by the said company and by the Washington County Railroad Company upon the accounts on which said sums were respectively paid by said companies, the said sums amounting in the aggregate to $152,864.55; provided that the said Houston and Texas Central Railway Company shall never issue an amount of the seven per cent. bonds above described to exceed $20,000 to the mile of completed road, including such bonds as have been already issued, nor shall said company ever issue any other bond that shall rank as a first mortgage bond on its road, without first paying the whole amount of the indebtedness of the company to the State.

SEC. 3. The said Houston and Texas Central Railway Company is hereby authorized—any former laws to the contrary notwithstanding—to build its road through the Counties of Limestone and Navarro, on the most eligible route to be designated by its engineers; provided that the main trunk of said railway shall pass through the County of Dallas, and to a point on Red River within fifteen miles of Preston, as is now required by law, and shall be built as fast as the branch.

SEC. 4. No forfeiture of any of the rights or privi-

leges secured to it by existing laws shall be enforced against the said Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the act of the twenty-first of September, A. D. 1866, entitled "An act granting lands to the Houston and Texas Central Railway Company"; but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A. D. 1866, had been in all respects complied with; provided, that the land grant to said company shall cease unless the said company shall complete their main trunk, east of the Brazos River, to Richland Creek, in Navarro County, within twelve months from the first day of October, A. D. 1870, and shall also complete their road to the City of Austin within two years after the passage of this act.

SEC. 5. The branch road from Navarro County to Red River, provided for in the first section of this act, shall be to all intents and purposes in law a part of the Houston and Texas Central Railway, and shall be under the control and management of the said Houston and Texas Central Railway Company in like manner as every other part of the said railway.

SEC. 6. All laws and parts of laws now in force concerning the Houston and Texas Central Railway Company, or the Washington County Railroad Company, not in conflict with the foregoing provisions, shall not be affected by the passage of this act; and the State shall always have the right to interfere by such legislation as may be thought necessary to prevent neglect on the part of the said Houston and Texas Central Railway, so that the same may always remain an adequate security to the State for the amount that may be due by the company.

SEC. 7. This act shall take effect from and after its passage (Spec. Laws of Texas, 1870, p. 325).